No. 91 1027

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DIANE L. WALDRON-SHAH
Petitioner,

versus

THE BOARD OF RETIREMENT OF THE
LOS ANGELES COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI

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Questions Presented

1 ~ Whether the California Code of Civil Procedure Section 1094.5.a, which precludes a trial by jury, is unconstitutional under the Seventh Amendment of the Constitution which guarantees that the right to trial by jury shall be preserved; but only in these special circumstances wherein an appeal from the County agency administering an unregulated employees' pension fund, can only be taken on writ to a judge in the County's court, and this deprivation of a trial de novo before a jury, where the agency cannot predetermine the evidence, has allowed decades of proven abuses of members' rights by LACERA.

2 ~ Whether the respondent, The Los Angeles County Employees' Retirement Association (LACERA), an unregulated local government agency administering a ten billion dollar pension fund, can claim not to have violated the petitioner's Constitutional right to Due Process under the Fourteenth Amendment in its hearings simply because it conformed with §31533 and §31534 of the California County Employees Retirement Act of 1937, which say nothing about how hearings should be conducted, and when of LACERA's 58,734 general members, only 228 were able to obtain any type of disability benefits in the most recent year reported, while LACERA adds a billion dollars a year to its pension fund, and when, *inter alia*, as shown by unrebutted prima facie evidence in this case, in its hearing process, LACERA and its referees, under color of judic[illegible]l authority– *continued*

Concealed, destroyed, mutilated and then lied about the contents of the petitioner's evidence in their judicial safe-keeping.

Prevented the petitioner from making a statement of her case at the hearings.

Mutilated and refused to accept much the petitioner's evidence in the hearings and left parts of her evidence that was accepted out of the referee's Summary of Evidence, in order to assert a new defense of laches later in the courts.

Violated the integrity of the hearing transcripts.

Deprived the petitioner of access to the hearing transcript and never made any statement of its case, or disclosure of its evidence, before or after the hearing, infringing the petitioner's right to rebuttal.

Concealed, then improperly used in the Referee's Recommendation and then inserted into the appendix for the court with a spurious exhibit number, an undisclosed document which LACERA used as its only substantial medical evidence to deny the petitioner's claim.

Abused its quasi-judicial powers, and the prerogative it asserts for itself to Presumption of Correctness, in order to commit frauds on the Court under the color of judicial authority, and thus, with all the above, deprived the petitioner of her Constitutional right under the Fourteenth Amendment to Due Process of Law.

3 ~ Whether it is a violation of the Equal Protection guarantees in the Fourteenth Amendment for the petitioner and all the members of this local government agency-administered pension fund to be uniquely deprived of the protection of all the state and federal statutes and regulatory agencies that protect the rights and interests of members of pension funds that are not administered by local government agencies.

4 ~ Whether it is a violation of Due Process under the Fourteenth Amendment for LACERA to claim for itself the double and contradictory legal advantages of ***being*** the trial court when it comes to determining what will be in evidence before the Superior Court, but then ***not being*** the trial court when it comes to its violations of the petitioner's Constitutional right to Due Process in its hearings.

PETITION

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RULE 14.1.d

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BY COURTS & ADMINISTRATIVE AGENCIES

The Full Texts Appear in the APPENDIX I

JUDGMENT TO BE REVIEWED

June 3, 1991, Judgment of the Court of Appeal of the Second Appellate District of the State of California .

* * *

CONCLUSION

Although this court has great sympathy for Waldron-Shah, the trial court's finding her disability is not service connected is supported by substantial evidence. Moreover, Waldron-Shah's delay in the prosecution of her claim has caused prejudice to the County such that it should be denied on that additional ground.

DISPOSITION

The judgment is affirmed.

The County to bear costs on appeal.

OTHER OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS BY COURTS & ADMINISTRATIVE AGENCIES

June 15, 1973, ***Decision and Order Approving Joint Compromise and Release by the Workmen's Compensation Appeals Board***, the petitioner was awarded a settlement "based upon the information in the medical record" in regard to injuries to the "back, chest, heart and head" of May 14, 1968 and to the "back, chest and heart" on February 14, 1969.[1]

November 21, 1973 ***Notification of Preclusion from Employment due to Work Restrictions*** from Department of Urban Affairs, quoting from The Los Angeles County Department of Personnel's Workmen's Compensation and Occupational Health:

"'The following restrictions should be observed in any and all future duties which this employee may be assigned now or in the future: 1) No freeway driving or automobile riding as a passenger. 2) Preclude from emotional stress or tension, i.e. anger, anxiety, confrontations, meeting deadlines, conflicts with authority.'"

"In view of the above, it has been recommended by the Claims and Rehabilitation Division of the Department of Personnel that you file a disability retirement application as provided by Section 31721 of the County Employees Retirement Law of 1937. If you do not wish to file such an application, you can contact me and I will file one on your behalf if you so desire."

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[1] *(There is a clerical error in the Compromise and Release Order- only the heart and chest were reinjured in the elevator accident. DLW)*

April 14, 1974 ***Denial of Disability Pension*** from The Board of Retirement of the County of Los Angeles Employee's Retirement Association"an order was made, finding that you are not disabled and denying your request for a service-connected retirement allowance."

May 25, 1976, ***Notice of Separation*** "*** because of your inability to physically perform the duties of your classification."

"This proposed separation is based on your physical inability to perform the job without the following restrictions as established by the Department of Personnel, Claims and Rehabilitation Division:

1) No freeway driving or automobile riding as a passenger.

2) Preclude from emotional stress or tension, i.e. anger, anxiety, confrontations, meeting deadlines, conflicts with authority.

Also it is based on your medical condition called Systemic Lupus Erythematosus (SLE) that you are currently suffering from. This medical condition was confirmed by Occupational Health Services, Department of Personnel, on May 5. 1976, which limits your physical ability to work only a few hours per day on days when you are physically able."

March 2, 1981, ***"No Record of Appeal"*** statement by LACERA's Jerry Hampton in letter

June 3, 1988, ***Summary of Evidence, Findings of Fact, Conclusions of Law, Recommendations.*** by LACERA's referee Burstein-

Findings of Fact-

1. Applicant was employed by the County for a period of two years and four months.

2. Applicant is permanently incapacitated for the performance of her duties as a Senior Community Improvement Analyst.

3. Applicant's incapacity for the performance of her duty did not arise out of nor was it in the course of her employment with the County.

Conclusions of Law

1. Applicant is not entitled to a service-connected disability retirement.

2. Applicant is not entitled to a non-service connected disability retirement because she did not have five years of service a s required by Government Code § 31720.

July 15, 1988, ***Notification of adoption by Board of Retirement of Referee Burstein's recommendation.***

March 7, 1990, ***Judgment Denying Peremptory Writ of Mandate.*** by Los Angeles County Superior Court Judge Zebrowski.

RULE 14.1.e. i

JUDGMENT TO BE REVIEWED

June 3, 1991, Judgment of the Court of Appeal of the Second Appellate District of the State of California.

September 17, 1991, Remittitur to Superior Court of California, County of Los Angeles Dept. 85 # C 700717

RULE 14.1.e.ii

ORDERS RESPECTING REHEARING AND WRIT EXTENSION

July 3, 1991, A timely Petition for Rehearing was denied by the Court of Appeal of the Second Appellate District of the State of California .

August 21, 1991, A timely Petition for Review was denied by the Supreme Court of the State of California .

October 11, 1991, Order #A-253 by Justice Sandra Day O'Connor of the Supreme Court of the United States extending the time for filing of the Petition for a Writ of Certiorari to and including December 19, 1991.

RULE 14.1.e.iv
STATUTORY PROVISION CONFERRING JURISDICTION

The Constitution of the United States

Article III

SECTION 1. .The judicial Power of the United States shall be vested in one supreme Court * * *

SECTION 2. The judicial Power shall extend to all cases in Law and Equity arising under this Constitution* * *

Article VI

* * * This Constitution and the laws of the United States which shall be made in Pursuance thereof * * *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Amendment VII

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved* * *

Amendment XIV

SECTION 1.* * * No State shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Jurisdiction: This case falls under the jurisdiction of the Supreme Court under Article III because it involves the deprivation of the petitioner's Constitutional rights to due process as guaranteed by the Fourteenth Amendment, by the personnel and referees of an unregulated local government agency, acting under color of judicial authority, in a trial so unfair and offensive to the Constitution that it cannot be called Due Process of Law.

In the special circumstances of this case, the petitioner also suffered an injury in fact due to the deprivation of her Constitutional right to equal protection of the laws under the Fourteenth Amendment and to a trial before a jury under the Seventh Amendment.

All the above are Constitutional issues that properly come under the jurisdiction of the Supreme Court of the United States.

Standing: This case has standing in that the petitioner is suffering an on-going injury in fact in the form of the deprivation of her pension and her right to obtain medical insurance, through the illegal acts committed under color of judicial authority by the respondent.

Standing is sufficient to justify relief in that there is no independent grounds under California law which would uphold the judgment, absent the respondent's unconstitutional acts which, *inter alia,* led the higher courts to unwittingly affirm plain error and to unwittingly commit judicial error.

Ripeness: This case is fully ripe in that a timely petition for review was denied by the California Supreme Court, the highest court in California in which a decision can be had.

RULE 14.f

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS

The Constitution of the United States

Article III

SECTION 1. The judicial Power of the United States shall be vested in one supreme Court * * *

SECTION 2. The judicial Power shall extend to all cases in Law and Equity arising under this Constitution* * *

Article VI

* * * This Constitution and the laws of the United States which shall be made in Pursuance thereof * * *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

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The California Code of Civil Procedure

Section 1094.5 . a

Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board of officer, the case shall be heard by the court sitting without a jury * * *

The California County Employees' Retirement Law of 1937

§31533. Referee; hearing; findings and recommendations.

Whenever, in order to make a determination, it is necessary to hold a hearing the board may appoint either one of its members or a member of the State Bar of California to serve as a referee. The referee shall hold such hearings and shall transmit, in writing, to the board his proposed findings of fact and recommended decision.

§ 31534. Service of findings and recommendations; objections; proceedings on referees report

The proposed findings of fact and recommendations of the referee shall be served on the parties who shall have 10 days to submit written objections thereto which shall be incorporated in the record to be considered by the upon receiving the proposed findings of fact and recommendations of the referee, the board may:

(a) Approve and adopt the proposed findings and the recommendations of the referee, or

(b) Require a transcript or summary of all the testimony, plus all other evidence received by the referee. Upon the receipt thereof the board shall take such action as.in its opinion is indicated by such evidence, or

(c) Refer the matter back with or without instructions to the referee for further proceedings, or

(d) Set the matter for hearing before itself. At such hearing the board shall hear and decide the matter as if it had not been referred to the referee.

Annual Report
Los Angeles County Employees' Retirement Association
For the year ending December 31. 1968

GENERAL INFORMATION -
RETIRED MEMBERS

APPLICATION FOR RETIREMENT

A retirement application is submitted to the Board of Retirement by each member who desires to retire. The Board of Retirement meets on the first Wednesday of each month to consider the applications for service retirement filed up to the 20th of the preceding month. Applications for disability retirement, accompanied by the attending physician's medical report, must be filed by the first of the preceding month to be considered at the next meeting of the Board of Retirement. *(page 4)*

Your Guide to Understanding and Selecting LACERA RETIREMENT PLANS [2]
(1991, first publication)

Definition of Disability *(page 2.5)*

2. Service Connected Disability:

A disease or injury arising from and in the course of employment that occurs or is aggravated as a result of performing your job, and permanently incapacitates you from performing the duties of your job.

When Application Must be Made *(page 2.5-6)*

(3) Any time, provided you are continuously physically or mentally unable to perform your duties from the date of discontinuance of service to the time you apply.

You may not apply if you have withdrawn your retirement contributions.

BY-LAWS OF THE BOARD OF RETIREMENT
Adopted Pursuant to Government Code Section 31525
(page 4.6-7)

II. MEETINGS

3. RULES OF ORDER

(7) Following the regular business of the Board, the Board shall consider applications for disability retirements and referee reports.

4. QUORUM

Five members of the Board of Retirement

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[2] LACERA no longer publishes the *Comprehensive Financial Annual Report and Information about Retirement, Disability, and Death Benefits for LACERA Members*.

The above 1991 brochure for new employees is, as far as is know, the first time the Board's by-laws have been available to members.

constitute a quorum.

6. COMMUNICATIONS AND REQUESTS

(B) Persons desiring to address the Board on any matter listed on the agenda, other than for a disability application or referee report, shall make their intention known prior to the beginning of the meeting by filling out a "Request to Address the Board" form which may be obtained from the staff secretary to the Board.

IX JUDICIAL REVIEW *(page 4.3)*

In any matter which the party of applicant is entitled to judicial review of any action taken by the Board of Retirement, the petition to the court must be filed within ninety (90) days from the notice of the Board's decision is delivered to the party or applicant , or served by certified or registered mail upon the party or applicant or the party's or applicant's attorney.

RULE 29.4.c

28 USC § 2403(b) may be applicable and The Attorney General of California will be served.

Rule 14.1.g

Concise Statement of this Case

This case shows the mischief that can be done to Due Process and the Justice System when a state legislature bows to political influence and abridges the Constitutional right of its citizens to be heard by a jury, the deprivation of which in this case protects the economic interests of a ten billion dollar, politically-controlled, local government pension fund that escapes all outside regulation.

This case exemplifies the offenses to the Constitutional right to Due Process that have become systematic and habitual in The Los Angeles County Employee's Retirement Association, (hereinafter called LACERA and sometimes referred to in the broader sense as The County indicating the whole governmental structure of which it is a part, including the Office of the County Counsel which represents LACERA in hearings and the courts).

So incredible are the abuses of the law and the Constitution in this case, that the petitioner has footnoted each aspect of her allegations and has provided documentary evidence in the appendices. LACERA did not even try to rebut this evidence before the court, but said only "The Board denies the petitioner's allegations,"[3] and in law, a general denial is no denial.

Appendix II contains the petitioner's *bona fides* as a member of the staff of the Board of Supervisors, which is necessary since as a federally funded employee in a rapidly expanding bureaucracy built upon federal poverty funds, in practically every document she in a different bureaucratic entity.

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[3] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)* page 4

However the whole time she was working directly with the County Board of Supervisors, who rule Los Angeles County without checks or balances. She was used to design HUD and HEW programs for which the Supervisors then obtained Federal funding. This is important to explain the insight Dr. Waldron has into how The County Board of Supervisors operates in relation to LACERA's administration, and its ten billion dollar pension fund.

LACERA is a totally unregulated, politically-controlled local government agency which is in charge of a multi-billion dollar pension fund, and has life and death powers over the pensions and right to obtain medical insurance of its members

The published mandate to LACERA's personnel is to minimize employer contributions,[4] and, as in most insuring entities, LACERA's appointments and promotions have come to be based on the bottom line which means how many claims are successfully denied.

In the most recent year for it will reveal the statistic, among LACERA's 58,734 general members, only 228 were able to obtain any type of disability retirement.[5] including for non-service-connected illness and accidents.

Without disability retirement status, the sick and disabled cannot get medical insurance, and without medical insurance many face a choice of destitution or death. Those who choose destitution for themselves and their families become a charge on the public welfare system.

While this happens, LACERA adds a billion dollars a year to its ten billion dollar pension fund.[6]

The ultimate control over LACERA is political because

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[4] *LACERA Annual Report for Members, Yr. Ended June 30, 1989,* p ii.

[5] *Ibid,* pp 59 & 60.

[6] *LACERA Annual Financial Report, Yr., Ending June 30, 1990,* p 70

the members of the County Board of Supervisors appoint those who are, along with the County Treasurer, the majority on LACERA's Boards of Retirement and Investment. The Board of Retirement appoints LACERA's administrator and he in turn controls LACERA's own, independent personnel section. (The three LACERA employees most closely involved in this case have each risen to be a Division head during the course of the case.[7])

This ultimate political control, along with the fact that LACERA deals in billions of dollars, makes very relevant, the actions of the County Board of Supervisors and their appointees, which are currently being investigated by the media.[8]

Because the members of LACERA are deprived of their Constitutional rights and protections, they have no control over what is being done with their benefits and their pension fund.

LACERA disregard for the law and cavalier attitude towards money in the hundreds of millions is revealed by the fact LACERA has for years improperly used its financial report to cover up a very, very questionable half billion dollar (plus interest over 20 years) County expenditure that never went to the voters for approval.

LACERA Comprehensive Annual Financial Report for the year ended June 30, 1990

> As of January 1, 1987, LACERA purchased two annuity contracts from insurance carriers to provide benefit payments to a portion of its retired members. * * * *(page 28)*

No other information is given by LACERA. The truth is that the annuities in question were **not** purchased with

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[7] *Comprehensive Annual Financial Rpt, LACERA, June 30, '90* page 8

[8] *APPENDIX II*, page 28

LACERA's pension fund money. Rather, the County Board of Supervisors borrowed $454.455 million dollars (plus the interest) through an unballoted debenture sold through First Interstate Bank. From this, Aetna was given two hundred million dollars to cover the pensions of 831 retirees, and Travelers was given $254 million dollars to cover the pensions of 1826 retirees (who the insurance companies got to choose.)

Two months after this deal was finalized, County Treasurer Richard B. Dixon was appointed by the Board of Supervisors to be the County's Chief Administrative Officer.

The appended newspaper clipping outlines the problems of cronyism and graft in CAO Dixon's administration.[9]

This is a very important to this case because the only administrative recourse from LACERA is to that Chief Administrative Officer, and when the petitioner provided him with prima facie evidence of LACERA's unlawful acts, seeking to have these matters remedied, Mr. Dixon replied, "I recognize that your distress stems from personal dissatisfaction with the outcome of your case."[10]

One of LACERA's unregulated violations of proper administrative procedures is restricting access by members to information about their benefit rights and the procedures to claim them, along with information about investments. In 1990, LACERA loaned more than two billion dollars in U S bonds to financially troubled Security Pacific Bank, against 102% in Security Pacific's collateral[11] the nature of which LACERA refuses to disclose.

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[9] COPLEY NEWS SERVICE, Nov. 4, 1991, *APPENDIX II* page 28

[10] *Letter of Richard Dixon, CAO of Los Angeles County, Sept. 3, 1991, APPENDIX II*, page 21

[11] *LACERA Annual Financial Report*, pages 25-26

At this same time, LACERA ceased publishing its *Comprehensive Annual Report for Employees*, and does not tell members who enquired about that report, that in its place they published a closely held *Annual Financial Report,* back in December 1990. However this *Financial Report* does not contain the same information about the full range of existing plans and benefits, and procedures, which were for a time put into the *Comprehensive Annual Report* and are once again not available in any form.

All of these things reinforce the impression made by the record of this case, of an unregulated agency that is spinning out of control, threatening not only the assets of the ten billion dollar pension fund which is its legal trust, but inflicting present hardship on the sick and disabled members of the pension fund who, like the petitioner, are being denied without due process the benefits for which they have paid with their contributions.

The members of LACERA are unable to remedy any of these matters because they cannot obtain due process from LACERA and they are deprived of equal protection of the laws, because they have no recourse to the state and federal statutes and regulatory agencies that enforce proper procedures and protect the interests of members of all other classes of pension funds. In addition, LACERA uses an unconstitutional state statute to prevent members, like the petitioner, from appealing their grievances to a jury.

THE BARRIERS LACERA PUTS BETWEEN MEMBERS AND THEIR BENEFITS

The statistic that only 228 people among the 58,734 LACERA general members were able to obtain any type of disability benefits[12] in a year is actuarially impossible absent LACERA putting insurmountable barriers between members and their benefits.

LACERA has had 54 unregulated years to perfect and systematize the means by which it avoids, evades, delays and denies claims.

These means include unlawful acts committed under color of judicial authority by its referees and administration. This case is replete with actions by LACERA that offend the Constitution and all the notions of due process and justice upon which our country was founded.

LACERA CONCEALS AND WITHHOLDS THE INFORMATION NEEDED TO CLAIM BENEFITS

For members of the retirement association seeking their benefits, the abuses begin with the deliberate concealing and withholding of information by LACERA.

The petitioner had no way to know from what LACERA wrote, said and published, that there was such a thing as a service-connected disability pension.

LACERA denied the disability application filed on behalf of the petitioner by the County itself after it made an independent determination that she was disabled from County employment as a result of the freeway crash and the elevator accident. To deny the claim LACERA used an undisclosed and nongermane report written by its employee doctor who chose never to see the petitioner.

LACERA never informed the petitioner that she had a

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[12] *LACERA Ann. R'p't for Members, Yr. Ended June 30, 1989,* p 59-60.

right to appeal its initial denial.[13] and this right was not mentioned in what they then published.[14]

To the very end of the administrative hearing process the petitioner was stonewalled when she asked for essential information on the procedures involved in the administrative hearing process, including such things as where to obtain a hearing transcript[15] and what the County Counsel's case and evidence were,[16] (through all the years and the multiple hearings, the County Counsel promised to, but never did, submit his pre-hearing statement.[17])

The petitioner wrote in detail of the unlawful things that were being done, to the administrator of LACERA, as well as the other personnel involved in the case (who are now Division heads) and did not receive a single meaningful reply.

The petitioner is probably typical of LACERA claimants in that she assumed that if she only lived long enough to get through the hearing process she could appeal to a court with a judge and jury where all would be redressed.

Nothing LACERA published or said, ever hinted at the legal finality of its hearing process. In fact there may have been deliberate deception when the first referee said loudly to the Deputy County Counsel outside the door so the petitioner could hear it, "She just going though the motions

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[13] See *Annual Report for 1968* on page 9, above, and the *Letter of Denial* on page 76 of *APPENDIX I.*

[14] *Annual Report Los Angeles County Employees' Retirement Association For the Year Ending December 31. 1968* p 10 above

[15] see *Transcript Burstein Hearing, APPENDIX II,* pages 6-17

[16] see *Letter to Referee Burstein, Ap 14, 1988, APPENDIX II* p 22

[17] see *Transcript Burstein Hearing, APPENDIX II,* page 17 & *Correspondence between Referee Burstein and County Counsel APPENDIX II,* pages 21-22

to get out to the court."[18]

It was only when the petitioner asked to have a jury at the Superior Court that she learned that LACERA'S administrative hearing process was legally a trial and she would never be entitled to another.

Surely proper notice is not just the when and where of an administrative hearing, but its legal import as well.

REFEREES BIAS TOWARDS THEIR EMPLOYER EXTENDS TO INTERFERING WITH INTEGRITY OF HEARING TRANSCRIPT

LACERA hires referees who work for it for years.

The short topical excerpts from the hearing transcripts in *Appendix II* reveal the illegal acts these referees commit under color of judicial authority.

At both hearings the County Counsel was clearly being directed by the referees who made no effort to disguise their bias, as the excerpts from the hearing transcripts in *Appendix II* clearly show.

Referee Black held the petitioner's original application behind the open top of his briefcase and misrepresented what had been written on it, reducing the claim to almost nothing,[19] Referee Burstein then claimed in his hearing it no longer existed, but finally long after the hearings he included it with the documents of the case, however in his summary of evidence he too misrepresented what was written on it and that the attachments had been removed while in LACERA's safekeeping- County Counsel referred to what was on these attachements at the second hearing.[20]

In several instances the referee prompted the County

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[18] *APPENDIX II*, page 20

[19] *APPENDIX II*, pages 1-4

[20] *APPENDIX II*, page 11

Counsel to lie about documents in the County Counsel's possession, and the County Counsel refused[21] . (This County Counsel was replaced with ones who followed with the referees' lead.)

The referees repeatedly signaled Ms. Michele McCoy, the court reporter used by the County on both cases, to stop taking down what was being said and there are clear gaps in the context of the transcripts where this happened.[22]

It appears that other statements may have been improperly redacted after the fact because points of due process reflecting on Constitutional issues that were heatedly raised, even argued over, in the hearings, simply do not appear in the transcripts.

Court reporter McCoy told the petitioner after the second hearing, where the petitioner finally learned from whom to obtain transcripts, that all the transcription, computer disks and printout from the first hearing, held only 18 months before, had been lost by her office.[23] and therefore she could not provide a copy of the transcript to the petitioner. LACERA refused to even let the petitioner read their copy of the transcript in their office, in spite of repeated requests[24]

The petitioner prepaid for a copy of the January 1988 hearing transcript and despite many requests, Court Reporter McCoy did not send this until the end of December 1988, months after the writ of mandate had to be

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[21] *APPENDIX II*, pages 10-11

[22] *APPENDIX II*, page 17

[23] *Note: County Counsel McCoy the principal counsel n this case has not responded to repeated interrogatories as to whether he is in any way related to Court Reporter McCoy.*

[24] *APPENDIX II*, page 18-20

filed with the Superior Court.[25] The petitioner did not get to read through a transcript from the first hearing until years later, after LACERA had to surrender a copy for the court.

As is shown in the transcript excerpts from both the Black and Burstein hearings, the petitioner was bullied out of her rights to be heard and to present evidence[26], and she did not realize that this loss was irreversible so she let respect for the referees' judicial role[27] and her own medical condition,[28] combine to force her to defer to the referees, since she assumed it would all be put right later in a court with a judge and jury. It was only in the Superior Court that she learned she was not entitled to either a jury or a trial de novo by the judge.

An excellent retirement lawyer had said in about 1984 that he he would take her case if she ever got through LACERA's endless delays to the court, but then he discovered the impossibility of winning against the County in matters involving LACERA and in 1988, he refused to take the case in spite of its much larger than usual contingency fee, explaining to the petitioner-

> They delay until your client is dead. They use the County Counsel to paper you to death. They do anything they want because there are no legal handles on LACERA. I'll never take another County case!

LACERA Illegally Removes the Petitioner's Evidence from the Hearing Record to Prepare for a New Defense of Laches on Appeal

[25] *APPENDIX II*, page 5

[26] *APPENDIX II*, pages 1-2 and pages 15 and 17 .

[27] *APPENDIX II*, page 40

[28] *APPENDIX II*, page 2

The abridgement by LACERA of the petitioner's right to present evidence extended beyond the hearings.

Referee Burstein simply left out of his Summary of Evidence, the prima facie evidence the petitioner had presented of LACERA's illegal acts, bad faith, and unclean hands in the matter of delays, which he himself had accidentally let come into evidence in the hearing during the paper shuffling intended to keep out the petitioner's evidence from the previous hearing.[29]

In Referee Burstein's Summary of Evidence for the Board of Retirement the petitioner's evidence on bad faith, illegal acts, and unclean hands in the matter of delays has been eliminated thusly–

> Exhibit 51 Various letters to or from Applicant
> These letters were not relevant to the underlying issues in this matter.[30]

However these matters were far from irrelevant to the case because once the evidence of LACERA's unclean hands in the mater of delays had been eliminated by Referee Burstein in the administrative hearing process, the County Counsel used a defense of laches in the higher courts, and succeeded with that defense in the Appeal Court, notwithstanding that by the admission of the court itself in its decision,

> None of the delays was explained by either party and each side blames the other for the failure to set necessary hearings.[31] ,

and under California law, laches is an affirmative defense which must be proven.

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[29] *APPENDIX II*, page 11-12

[30] *APPENDIX I*, page 64, and page 37 in original document *The Recommendation to the Board of Referee Burstein.)*

[31] *APPENDIX I, page 20*

> The burden of proving laches rests upon the one relying on such a defense. *Brown v Oxtoby* (1941) 114 P 2D 662 45 CA 2D 702.
>
> Where no direct evidence is introduced on an issue, the finding is properly against the party who has the burden of proof. *People v Thomas* (1952) 239 P 2d 914 108 CA 2d 832

Thus the ruling of laches for the first time by the Court of Appeal is judicial error sufficient to reverse. The petitioner made this legal point in her petition below, but she was not granted a rehearing or review, so this point was never considered by the court.

LACERA CONCEALS THEN ILLEGALLY INSERTS ITS 'SUBSTANTIAL' EVIDENCE TO DENY INTO THE RECORD

The activities of LACERA's referees and legal staff were not just limited to keeping statements and documents out of evidence, they also improperly inserted undisclosed documents into the legal evidence after the fact.

In this case, LACERA's "substantial" evidence to deny[32] was a report written without seeing the petitioner by the County's own doctor in 1974. This report was never revealed as being the basis for denial at the time of the original denial, which is not lawful in California[33] and despite repeated opportunities this report was not submitted by County Counsel at the hearing of record, nor

[32] *APPENDIX I*, pages 15-16, Decision of the Court of Appeal

[33] The award must be based on evidence... legally and properly introduced. .... a trier of facts, has no legal right to predicate its award upon the opinion of its own or any other expert when such opinion does not appear in the record. *Young v Industrial Accident Commission* (1940) 38 CA 2 d 250, 257, 100 p 2d 1062

afterwards. And despite the protests of the petitioner[34] , County Counsel never made a pre-hearing statement in all the years the hearings dragged on.[35]

Instead, this 1974 document just appeared in Referee Burstein's Recommendation to the Board with his footnote saying the Moss report had been "submitted"[36] at a previous hearing (at which in fact no evidence was taken[37] and from which Referee Burstein himself emphatically ruled that no evidence would be carried over.[38]) And of course there was no pre-hearing statement by County Counsel before or after any of the hearings so this document was never revealed.

And, as noted above, petitioner was also prevented by LACERA from obtaining copies of the transcripts,[39] from which she could have discovered the Moss report had never legally been entered into evidence.

To use the Moss report, LACERA had to assert its trial court right to presumption of correctness and stand upon the rule of substantial evidence. LACERA asserted that all the decades of medical evidence to the contrary, notwithstanding, the Moss report was the ***only*** substantial evidence. LACERA dismissed the decades of weighty evidence to the contrary by saying–

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[34] *APPENDIX II*, page 22

[35] see *Transcript Burstein Hearing*, *APPENDIX II*, page 15 & *Correspondence between Referee Burstein and County Counsel APPENDIX II*, pages 21-22

[36] *Burstein Recommendation to the Board*, *APPENDIX I*, page 66

[37] *Black Hearing Transcript*, *APPENDIX II*, page 4

[38] *Burstein Hearing*, *APPENDIX II*, page 7.

[39] see *Transcript Burstein Hearing*, *APPENDIX II*, pages 8-10 & *letter to Charles Spenser, Retirement Administrator, Jan 11, 1988*, *APPENDIX II* page 18.

> But not all medical opinion amounts to "substantial" evidence.* * *
>
> *RESPONDENT'S ANSWER TO PETITION FOR REVIEW*, page 5

It was upon the Moss report, under the rule of substantial evidence, that the Appeal Court had to affirm the decision below[40]

> Although this court has great sympathy for Waldron-Shah, the trial court's finding her disability is not service connected is supported by substantial evidence.
>
> *APPENDIX 1*, page 20, Conclusion to the Opinion of the Court of Appeal

This use by LACERA of undisclosed, illegally inserted evidence as their substantial evidence to deny, was a fraud upon the court creating plain error sufficient to reverse.

LACERA Depends upon a Law that Offends the Seventh Amendment

After LACERA stacked the evidence against claimant in its administrative hearing process, LACERA then used the California Code of Civil Procedure §1094.5 to limit any appeal from a County administrative hearing to a judicial review on a writ of mandate before a judge in the County's court,[41]

LACERA then demanded for its hearing process Presumption of Correctness from the courts,[42] and relied

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[40] *APPENDIX 1*, pages 15-16, Decision of the Court of Appeal

[41] *RESPONDENT'S BRIEF ON REHEARING, (California Court of Appeal) 6/26/91*, page 2.

[42] *Respondent's Response to Petition for Writ of Mandate, 12/7/89* Page i, *JOINT APPENDIX* p 453

upon the Rule of Substantial Evidence.[43]

LACERA told the Superior Court it was entitled to be PRESUMED CORRECT,[44] (as it capitalizes and underlines this instruction to the court) and had the right as a trial court to determine what would be in evidence before the Superior Court.

But then, when LACERA's unlawful acts in its hearing process were at issue before the Court of Appeal, LACERA told the Court of Appeal that the Superior Court was the "trial court"[45], and said "Fact-finding is the province of the trial court, not the courts of appeal* * *."[46] And thus LACERA precluded consideration of what happened in its hearing process. However, this is a total perversion of the judicial process, because, LACERA was the trial court since it demanded the right to have its selection from the evidence adhered to by the Superior Court, and by definition–

> **Trial court.** The court of original jurisdiction where all evidence is first received and considered; * * *
>
> *Black's Law Dictionary, Abridged Sixth Edition,* 1991, page 1046

In this case, LACERA's defense is that the issues of its unconstitutional and unlawful acts were not raised in what LACERA ***now*** calls the "trial court".[47] though of

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[43] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)*, page 2.

[44] *Respondent's Response to Petition for Writ of Mandate, 12/7/89* Page i, *JOINT APPENDIX* p 453

[45] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)*, page i, 2, 3,4,6,7.

[46] *Ibid*, page 6.

[47] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)*, page 3

course they were most certainly raised repeatedly in the hearing process when the petitioner was able to do this herself, as the entire *Appendix II* attests. And the petitioner contends that this was the trial court since LACERA demanded for its hearings a trial court's prerogatives, including the exclusive right to take evidence.

When the petitioner wanted to press the issues of LACERA's illegal acts, the attorney she found for the appeal, threatened her with, "The judge knows all about the things the County does and he doesn't need you to tell him. If you bring up any of these things it will make the judge very angry and you will lose your case. The judge doesn't want confrontations in his court."[48]

Because it is so hard to win a case against the County, is is very, very difficult to find legal counsel and this firm whose name the petitioner discovered on the losing side of a case cited against LACERA, was the only one which would take her case.

The County Employees Retirement Law of 1937, is Unconstitutional in Parts and is Silent on Critical Matters of Due Process

LACERA claims that all the petitioner's rights were protected because LACERA abided by California Government Code §31533 and §31534, the County Employees Retirement Law of 1937.[49]

However, all that is said in the code of the entire hearing process up to the point that the referee sends his decision to the Board, is a referee may be a member of the Board or of the County Bar, in §31533. And §31534 does not provide for claimants or their attorneys to appear

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[48] *APPENDIX II*, pages 18-20

[49] *RESPONDENT'S BRIEF ON REHEARING, (California Court of Appeal) 6/26/91*, page 2.

before the Board of Retirement, which is also specifically prohibited by the by-laws of LACERA.[50]

When the petitioner approached state legislators to have The County Retirement Law tightened up, even the redoubtable Tom Hayden said, "We leave the County alone and they leave us alone."

When the petitioner sought the help of the State Department of Insurance,they regretfully replied that they have no jurisdiction over LACERA.The State Insurance Department simply has no authority over LACERA.

The US Department of Labor also told her that they have no authority over local government agencies and local government agencies do not fall under the ERISA statutes.

LACERA does not come under any state or federal Administrative Procedures act.

In fact as a local government agency, LACERA is free of all outside regulation, and shelters under government immunity from penalties for its wrong doing.

There is simply nowhere for the members of LACERA to turn except to the Constitution of the United States and its guarantee of a trial before a jury, or failing that perhaps to the provision of Federal Masters in Chancery under Rule 53 of the Federal Rules of Civil Procedure.

This case exemplifies, with prima facie evidence covering 23 years, the unregulated and unconstitutional activities by which LACERA so successfully reduces the number of members who are able obtain disability benefits. None of LACERA's means for doing this would be permitted under any Administrative Procedures Act, nor ERISA, nor would they be countenanced by a jury.

The County has offered no rebuttal to the charges of unlawful acts, supported by prima facie evidence, that have been alleged and protested in this case by the petitioner

[50] *LACERA Retirement Plans pp 4.6-4.7, PETITION* p. 9

over more than a decade . The County's only response is that "The Board denies the petitioner's allegations."[51] And in law, a general denial is no denial.

Neither has the County attempted to argue against the laws which create plain error and judicial error in the judgment against the petitioner.

Neither has the County addressed the Constitutional issues. LACERA simply told the court it has abided by §31533 & 31534 of the Retirement Law and therefore the petitioner's Constitutional rights have been protected.[52]

RULE 14.1.h

FEDERAL QUESTIONS

The Constitutional issues were raised as soon as the petitioner discovered them, to the best of her ability and whenever she was permitted. A good measure of the deprivation of Constitutional rights in this case involves her not being allowed to effectively raise the Constitutional issues.

The Constitutional issues were the major part of the argument in the petition for rehearing, prepared by the petitioner in the few days remaining after her attorney said he would not continue with the case, and without the benefit of her complete case file.[53]

The petitioner herself was the only one to raise these matters because her attorney told her he would not mention the Constitutional issues or LACERA's unlawful behavior because to do so would be "unethical," and

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[51] *RESPONDENT'S ANSWER TO PETITION FOR REVIEW, (California Supreme Court)* page 4

[52] *RESPNDENT'S BRIEF ON REHEARING,* page 2

[53] *APPENDIX II,* page 26

would "make the judge very angry" and she would lose her case.[54] However, his advice may have been tainted by conflict of interest because his firm benefits from County Worker's Compensation cases, and his interest in a good relationship with the county is indicated by that fact that in spite of repeated opportunities, including forwarding the remittitur to his client, he chose not to tell his client that she had been awarded costs against the County and had to file for them.[55]

The most concise statement of the Constitutional issues by the petitioner is to be found on page 3 of her Petition for Review to the Supreme Court of California-

> Because LACERA claims immunities as a government entity from all outside regulation by by such bodies as the California State Insurance Department, the Department of Labor, and the federal ERISA statues, and immunity from claims for damages and bad faith, all of which things constrain abuses by other pension funds, the situation as a whole is a Miscarriage of Justice in which the petitioner has been deprived of her Constitutional right to due process, and because these unregulated abuses only occur in funds which shelter under government agency status, to equal protection of the State and Federal laws that protect members of other pension funds. The petitioner also contends that none of these abuses could prevail if state laws governing County Retirement Funds did not deprive her of the Constitutional right to a trial before a jury. (*emphasis added, DLW*

[54] *APPENDIX II*, pages 24-25.

[55] *APPENDIX II*, page 26

Rule 14.1.j
Concise Argument
for the Allowance of the Writ

It is now only the Supreme Court that can correct these offenses to the Constitution which have fostered corruption in a huge, unregulated, local government pension fund, and have allowed that fund to wantonly deprive its members of their benefits through abridging their right to due process in its administrative procedures and hearings. These things could never happen if the members had their Constitutional right to take their grievances to a jury.

The California Code of Civil Procedure Section 1094.5.a clearly offends the Constitution.

> Where the writ is issued for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board of officer, the case shall be heard by the court sitting without a jury * * *.

This statute inarguable offends Amendment VII of the Constitution–

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved * * *

In light of Amendment VII, there can be no question that California California Code of Civil Procedure Section 1094.5.a is unconstitutional, and the second paragraph of Article VI of the United States Constitution is unequivocal-

> This Constitution and the laws of the United States which shall be made in Pursuance thereof * * *shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The remedy for this offense is clearly within the jurisdiction of the Supreme Court under Article III of the Constitution–

> SECTION 1. The judicial Power of the United States shall be vested in one supreme Court * * *
>
> SECTION 2. The judicial Power shall extend to all cases in Law and Equity arising under this Constitution* * *

Therefore, §1094.5.a of the California Code of Civil Procedure offends the Seventh Amendment of the Constitution and it is within the jurisdiction and power of the Supreme Court of the United States to declare that law unconstitutional and remedy the abuses that have grown out of it, endangering the public good and causing severe hardship for thousands of individuals, including the petitioner, who are deprived of due process in the administrative hearings when they seek their pension fund benefits and then have no redress before a jury.

The remedy to all this is to declare §1094.5.a of the California Code of Civil Procedure unconstitutional in the special circumstance of conjunction with the California County Employees Retirement Law of 1937 and thus restore to the petitioner and the other members of LACERA their Constitutional right under the Seventh Amendment to a trial before a jury.

The petitioner understands that this court must be concerned not to increase the burden on the courts below. However, under §1094.5.a, the litigants already have the right to take an appeal to the County Superior Court on writ of mandate, and can appeal from there to the Court of Appeal, therefore finding §1094.5a unconstitutional would not open the doors of the courts to any additional cases.

In fact it would vastly reduce the burden of cases on the courts if §1094.5a were found unconstitutional and the members of the pension fund who are aggrieved in the administrative hearing process were allowed their Constitutional right to a trial de novo before a jury, because the one thing a pension fund like LACERA fears is a jury of outraged citizens, and therefore LACERA would abide by due process to avoid a jury.

This case will not effect administration law generally because these are very special circumstances wherein, a politically-controlled, totally unregulated local government agency, with governmental immunities from civil actions, is administering a pension fund to which members contribute to be insured against disability, and that agency can confine the appeal from its own administrative decisions to a judge in its own court. And, of course, the members of LACERA already have and use the right to appeal to the courts.

The courts below would therefore benefit greatly from a ruling that §1094.5.a is unconstitutional in these special circumstances.

Consider how many appeals are generated by a situation in which for 58,734 LACERA general members, only 228 are successful in obtaining their benefits in a year. The unsuccessful claims often involve just, but legally futile, appeals that weigh on the consciences and calendars of the court.

In light of the above, please consider what the Court of Appeal wrote in its Conclusion on this case, and the extraordinary gesture the Appeal Court made–

CONCLUSION

> Although this court has great sympathy for Waldron-Shah, the trial court's finding her disability is not service connected is supported by substantial evidence. Moreover, Waldron-Shah's delay in the prosecution of her claim has caused prejudice to the County such that it should be denied on that additional ground.

DISPOSITION

The judgment is affirmed.

The County to bear costs on appeal.

The petitioner prays this honorable court for the Constitutional remedies and resultant reliefs, for which she, and the sick and disabled members of LACERA, and their families, have waited so long.

Respectfully submitted,

D L Waldron

Diane L. Waldron
Petitioner in Pro Se December 19, 1991

Note: Rule 33.3. as regards Rule 14.1(f) applies to page length. There are 5 pages under Rule 14.1 (f) within the petition.

Supreme Court, U.S.
FILED
DEC 27 1991
OFFICE OF THE CLERK

91 1027

No._____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DIANE L. WALDRON-SHAH
Petitioner,

versus

THE BOARD OF RETIREMENT OF THE
LOS ANGELES COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI
APPENDIX I
OPINIONS, ORDERS, FINDINGS, & CONCLUSIONS

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In Pro Se

APPENDIX I
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APPENDIX I

Rule 14.1.k.i

Opinion of the Court whose Decision is sought to be Reviewed

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL
OF
THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION THREE

FILED JUNE 3, 1991

2d Civil No. B050005
COURT OF APPEAL SECOND DISTRICT
(Super. Ct. No. C700717)

DIANE L. WALDRON-SHAH
Plaintiff & Appellant,

v.

BOARD OF RETIREMENT OF THE LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION,
Defendant & Respondent.

APPEAL from a judgment of the Superior Court of Los Angeles County. John Zebrowski, Judge. Affirmed.

Lemaire & Faunce and Mark Ellis Singer, for Plaintiff and Appellant.

De Witt W. Clinton, County Counsel, Milton J. Litvin, Assistant County Counsel, and Rosanne Wong, Deputy County Counsel, for Defendant and Respondent.

Plaintiff and appellant Diane Waldron-Shah (Waldron-Shah) appeals the denial of a petition for writ of mandate respecting her application for a service connected disability from the County of Los Angeles (the County). The defendant and respondent Board of Retirement of the County of Los Angeles Employees Retirement Association (the Board) found Waldron-Shah's employment had not contributed substantially to her disability and denied her disability application. The trial court's denial of Waldron-Shah's petition for writ of mandate affirmed the decision of the Board.

Because substantial evidence supports the trial court's decision, the judgment is affirmed.

FACTUAL AND PROCEDURAL BACKGROUND

1. Proceedings before administration agency.

Waldron-Shah began to work for the County in 1967, and in 1968 was employed as a senior community analyst for the Department of Urban Affairs. On May 14, 1968, she was involved in a traffic accident which she summarized as a "high speed car crash in a small lightweight car, caused by a hit and run driver on the Harbor Freeway as I was returning to the County Hall of Administration from field research in Watts for the Model Cities Program application."

Sometime after the traffic accident, Waldron-Shah returned to her regular duties and had a second accident in an elevator in the Hall of Administration on February 14, 1969. According to a report prepared by Sim Dimitroff, M.D.

(Dimitroff) dated February 20, 1969, addressed to the State Compensation Insurance Fund, the elevator accident occurred after Waldron-Shah had attended her "regular

[morning] duties, nothing strenuous. She went to lunch with a friend at 1:00 P.M. and after eating a heavy, hearty meal, she returned to her building in the supervisors' area. She climbed the stairs and then stumbled on the elevator which triggered a sensation of rapid, irregular heart action, weakness and an uncomfortable sensation in the center of the chest. She felt weak thereafter and was taken to see a health officer in the building but was unable to get any assistance at the time. She was then taken to the Central Receiving Hospital and finally to the Ross-Loos Clinic. [1~] . . . She was not hospitalized and rested at home over the week-end. She felt better and was able to go shopping Saturday, feeling stronger."

After the elevator accident, Waldron-Shah worked intermittently until September 12, 1969 when she stopped working altogether.

On June 15, 1973, Waldron-Shah entered into a compromise and release of a Worker's Compensation Claim for $17,500. In October, 1973, the Department of Community Development received notification of restrictions on Waldron-Shah's work which precluded freeway driving and emotional stress or tension.

On or about January 23, 1974, she applied for a service-connected disability retirement based upon "industrial

injury of May 14, 1968 and February 14, 1969 as described in the Department of Personnel [Worker's] Compensation records."

In a letter dated March 26, 1974, Charles N. Moss, M.D., a medical consultant to the Board, reviewed Waldron-Shah's case relative to her disability claim and concluded it was not service connected. Moss noted, "This medical file is voluminous and the patient has seen at least

11 different physicians.n After reviewing the reports of these physicians, Moss concluded, among other things, that Waldron-Shah "returned to work after her [traffic accident] injury and apparently seemed to get along normally for several months but apparently because of the pressures of her job, she began to somatosize [sic] her anxieties and has been complaining of pain in the back and chest with bizarre radiations intermittently ever since. [¶] . . . Several months later she began to complain of bizarre pains. [¶] Her anxiety about the pressures of her job appears to be her main problem." "[F]rom an orthopedic standpoint, she is not disabled and should be able to continue her usual and customary interesting work activities."

On April 3, 1974, the Board found Waldron-Shah not disabled. A form apparently related to this finding which is headed Continuation Sheet For Disability Determination~ and dated December 23, 1974, states: "Medical evidence reveals claimant has systemic lupus erythematosis [Lupus or S.L.E.] manifested by persistent and recurrent exacerbations of

(4)

pericarditis, joint pains, abdominal pain, renal calculi, facial rash, and fevers. Also, claimant has been involved in elevator and automobile accidents which have caused trauma to a lumbar disc with resultant sciatica. In spite of the above findings, she retains the functional capacity to do her usual, sedentary work as a research analyst. Accordingly, disability DENIED."

On or about October 10, 1974, the Board granted a hearing on the disability matter. However, nothing further transpired in the case until a prehearing conference on December 11, 1984, some 10 years later. In the interim, in February 1976, Waldron Shah advised the County she had

Lupus and could work only a few hours a day. Based upon earlier imposed restrictions that Waldron-Shah not drive on the freeway or be subjected to stress, and the fact the County could not provide a position which was compatible with Waldron-Shah's Lupus restrictions, it released her from service in a letter dated June 9, 1976. The letter indicates Waldron-Shah had been off work continuously since September 12, 1969.

On October 15, 1976, Waldron-Shah was examined by J.C.A. Madgwick, M.D., at the Royal Free Hospital in London regarding low back pain. A report of that examination states: "About two weeks previously she had lifted a typewriter and had felt something give in her back. There was some radiation of pain down the back of the left leg . . . and later she

(5)

developed similar radiation of pain down the right leg . . . . [¶] She stated that about eight years previously she had been struck by a car and had injured her back. Since that time she has had episodes of backache and sciatica and on one occasion was advised that she required surgery for the disc lesion.

At the prehearing conference on December 11, 1984, the referee advised Waldron-Shah of her responsibilities to move the case forward. Waldron-Shah apparently did nothing and the referee wrote a letter to her dated April 9, 1986, asking what she intended to do with respect to her claim. Thereafter, Waldron-Shah sent the referee a packet of medical records which documented her condition.

At a hearing conducted on June 11, 1986, Waldron-Shah appeared in propria persona and testified her Lupus condition resulted from the traffic and elevator accidents. Further, Waldron-Shah testified she had suffered symptoms of Lupus within days of the accident although it

was not diagnosed as such until 1971 or 1972. At the end of the June 11, 1986 hearing, the referee agreed to review the reports presented and to consider medical articles presented by Waldron-Shah as expert medical evidence. However, the referee did not issue a recommendation and the matter was scheduled for a second hearing.

At the second hearing conducted on January 7, 1988, by a different referee Waldron-Shah again appeared in propria persona and testified as a result of the traffic and elevator

accident, "almost immediately afterwards I began to manifest multiple symptoms and signs of lupus, visceral lupus." She testified stress aggravated her Lupus and heart conditions.

In a written summary prepared for the hearing, Waldron-Shah attributed aggravation of the Lupus to the accidents and "the extreme stresses" of her employment which she wrote fell into four categories: "1) Gross overwork in 80 and 90 hour weeks, . . . [¶] 2) My struggle against corruption in the awarding of contracts for the use of the Federal funds, for which I had titular responsibility, but over which I had no actual control. . . . [¶ 3) The threats and pressures brought upon me by the Board of Supervisors' people trying to make me sign false statements for the US Government saying work was completed on the Federal contracts which had not even begun . . . . [¶ 4) The appeals for help made to me by the pretty young Chicano secretaries who were being taken by our director, Bill Bond, a political appointee, to the apartment in Monterey Park of his young administrative assistant, and there used sexually."

Among the documents provided the referee was a report prepared by Howard Steven Shapiro, M.D.

(Shapiro) dated November 11, 1987, which states "[Systemic Lupus Erythematosus] results from a disordered immune system wherein for unknown reasons the victim develops antibodies against the tissues of their own body; any organ may come under attack or involvement. Almost any system in the body may become

(7)

disordered, despite an often healthy appearance in the patient, not infrequently the internal organs such as the brain, heart, kidneys, bone marrow and blood forming systems and gastrointestinal systems may become involved. Not infrequently, muscles, joints, tendons and skin become involved as does all mucus membranes in the body. . . . [¶] . . . [¶] . . . A quick and brief overview of her medical condition and its treatment reveals a multi-system progression of her Lupus beginning as early as 1968 and involving her cardiovascular system, bone marrow and central nervous system. She had hospitalizations [in 1973] at UCLA because of uncontrollable and life threatening fevers associated with dangerously low white blood cell count. [¶] . . . The Lupus process has diminished the function of her cardiopulmonary system resulting in shortness of breath, angina pain, and . . . severe cardiac pain.

Another document in the record is a Ross-Loos Hospital summary for Waldron-Shah which indicates "a diagnosis of S.L.E. made in 1969 based on a F.U.O., pleuritis, pneumnitis, pericarditis, 'butterfly' facial rash, photosensitivity, joint pains, abdominal pain, leukopenia and sores on tongue. She was evaluated at U.C.L.A. and at City of Hope for anemia and leukopenia but never was treated with steroids until July, 1974 when her recurrent fevers were treated . . . . Thirteen years ago she was

diagnosed as having malaria based on being in an endemic area and on a positive blood smear. . . . [¶] FAMILY

(8)

HISTORY: Maternal sister, cousin, and grandmother died at ages 16, 23, and 32, respectively, of a 'systemic disease', probable S.L.E."

After the January 7, 1988 hearing, the Board's referee prepared a 46-page Summary of Evidence, Findings of Fact, Conclusions of Law [and] Recommendations. After review of the evidence, the referee concluded Waldron-Shah had failed to establish permanent incapacity as a result of the orthopedic and cardiac injuries related to the traffic and elevator accidents. Although the record supported the finding "that at the present time Lupus has rendered [Waldron-Shah] permanently incapacitated for the performance of her duties," the referee noted Waldron-Shah had not presented this aspect of her disability to the Board in 1974.

Nonetheless, the referee concluded Waldron-Shah's employment had not substantially contributed to her Lupus condition. "While [Waldron-Shah] alleged that her Lupus condition was the result of her two accidents and/or industrial stress, she offered no medical evidence to support her claim. Applicant's theory was based upon the fact that her Lupus symptoms manifested only after these injuries. However, there was absolutely no evidence, other than [Waldron-Shah's] speculation and conjecture, that either . . . injury caused her condition or that the chronology was anything other than pure coincidence. With regard to the issue of stress, Dr. Shapiro and Dr. Gross wrote that stress could aggravate Lupus.

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However, Dr. Gross merely concluded in 1987 that Lupus could be aggravated by stress; Dr. Shapiro wrote about 1987 stress on her current condition and addressed himself to a current possible eviction action against Applicant. Neither physician analyzed Applicant's case and opined that Applicant's alleged industrial stress directly caused the initial onset or aggravated Applicant's Lupus condition to the point that the disease permanently incapacitated her when she stopped working in 1969. In fact, in April 1971, she told Dr. Tuchman that she stopped working because of her back and rib injuries. Therefore, assuming arguendo that Applicant experienced industrial stress, the evidence does not warrant the conclusion that her Lupus condition was service-connected. [¶] With regard to the alleged industrial stress experienced by Applicant, the record revealed contradictory evidence. While Applicant alleged that one of the sources of stress was the amount of overtime that she worked, Dr. Dimitroff's February 20, 1969 report reflected that Appellant told him that she did not work any overtime on the weekend and worked very little overtime at other times. Because Dr. Dimitroff's report was relatively contemporaneous to the events, it should be deemed to be the most accurate. In addition, the various statements of the alleged stress given to the various physicians and at the hearing were not consistent. Further, it must also be noted that Dr. Dimitroff commented that none of the stresses cited to him by Applicant were current at the time of his

(10)

February, 1969, examination. For all the above reasons, Applicant's accuracy as a historian is suspect."

Waldron-Shah filed a rebuttal to this recommendation. In it she stated she gave her work history to Dimitroff during a lull between federal program projects and that her work generally required extensive overtime. She reasserted "[a]lmost immediately after the accident [she] began manifesting the symptoms that were later to be diagnosed as Lupus" "No one can ever prove or disprove that my particular case of Lupus was caused by the injuries and stress, but I was in perfect health and very productive before the first accident. After that first accident I never recovered my health and strength. Then after my heart was reinjured in the elevator accident, I immediately suffered the onset of manifold symptoms all of which later proved to be part of the Lupus."

2. Petition to superior court for writ of mandate.

Waldron-Shah thereafter retained counsel and filed the instant petition for writ of mandate. In connection with the petition Shapiro prepared an addendum dated November 21, 1989, to his report of November 11, 1987, which stated: ~It is my medical opinion that Ms. Waldron's medical history reveals that the Systemic Lupus Erythematosus from which she has suffered since at least the time of her accidents in 1968 and 1969 was exacerbated by the on-the-job car accident injuries and the on-the-job elevator accident injury in 1969,

and that this Lupus condition was further aggravated by the ongoing stress of her job. It took several years before her many symptoms were definitively diagnosed . . . . This is not at all uncommon with SLE. [¶] If this conclusion was not explicit in my earlier letter, I wish to make it explicit." The County objected the addendum was not part of the administrative record. In a declaration filed by Waldron-Shah in response to the Board's opposition to her petition for writ of mandate, she stated no one in her family had ever died of Lupus but that a cousin had recovered from childhood Lupus. Further, no doctor ever has advised her that Lupus is a congenital condition and she has never seen any literature which so indicated. She explained her trip to England occurred during a period of partial remission of her back and heart symptoms. The trip had been all expenses paid offered by the British Tourist Authority designed to cause her to produce free magazine coverage. She injured herself lifting a typewriter when she ruptured the disc she had compressed in the traffic accident.

3. Trial court statement of decision.

After consideration of the writ petition, the trial court issued a statement of decision which stated: ¶ . . . The petitioner is concededly disabled. . . . [¶] 2. The evidence of petitioner's car and elevator accidents does not establish that the injuries sustained in those incidents, standing alone and without the Lupus complication, caused a

disability. Several of the doctors treating petitioner prior to the Lupus diagnosis seemed perplexed at petitioner's symptoms and complaints, attributing them variously to 'neurosis,' emotion' and 'anxiety' and finding them not indicated by any objective finding. Later, after the Lupus diagnosis, it becomes clearer why petitioner would have

those symptoms and complaints even though objective evaluation of her accidental injuries would not indicate such problems. The evidence indicates that the Lupus condition (which, according to the evidence, can attack joints and internal organs) is the cause of the disability rather than the accidental injuries. [¶] 3. Petitioner contends that her Lupus condition was either caused or aggravated by the stress of her employment, and that her Lupus-induced disability is therefore service-connected. . . . [¶] 4. The primary evidence offered to establish a substantial connection between petitioner's Lupus and her job are the report (Ex. 2-2) and [addendum] letter (Ex 5) of Dr. Shapiro. This evidence does not evaluate petitioner's particular job circumstances, describe the connection between those circumstances and the onset or aggravation of petitioner's Lupus condition, or explain the specific basis for an opinion of such a connection. Instead, the evidence of Dr. Shapiro states somewhat generally that Lupus can be aggravated by stress, a view which -- if not conceded -- is at least not strenuously contested. The court is thus left with two options. One is to conclude that since

Lupus can be aggravated by stress, anyone who has Lupus and can demonstrate previous job stress has established a substantial connection between their job and Lupus. Such a conclusion would be at least close to, if not completely, a conclusion that Lupus in a previously employed individual is virtually always service connected since virtually all jobs involve stress to some degree. The court's second option is to search for specific evidence that this case of Lupus has substantial connection to this job. The latter seems the correct analysis in view of the language in Bowen v. Board of Retirement (1986) 42 Cal.3d 572, 578], yet the record

presented contains no evidence sufficient to establish that petitioner's job made a substantial contribution to her Lupus condition. Dr. Shapiro's 11/21/89 letter [addendum] merely states his conclusory opinion that petitioner's accidents plus the stress of her job aggravated her Lupus condition. There is no way the court can evaluate the 'substantiality' of this conclusory opinion; it can only be accepted on faith or rejected as unsupported. Since the law does not provide for mere acceptance of opinions on faith, and instead requires an evaluation of the evidence for the purpose of finding or not finding substantial evidence of the connection, the court cannot properly merely accept Dr. Shapiro's bald conclusion that the connection exists in this case. The court has considered and receives in evidence petitioner's Ex. 5 (Dr. Shapiro's 11/21/89 letter), but in view of the foregoing, it has no material impact upon the court's decision. [¶] 5. The petition for writ of mandate is denied."

(14)

This appeal followed.

CONTENTIONS

Waldron-Shah contends she is disabled due to conditions other than Lupus, the trial court's finding is not supported by substantial evidence, and the weight of the evidence establishes her disability is service connected.

The County counters the trial court properly found Waldron-Shah's disability was not service connected and further argues she is guilty of laches for delay in prosecution.

DISCUSSION

1. Standard of Review.

Government Code section 31720 provides, in pertinent

part: "Any member permanently incapacitated for the performance of duty shall be retired for disability regardless of age if, and only if: [¶] (a) [His or her] incapacity is a result of injury or disease arising out of and in the course of . . . employment, and such employment contributes substantially to such incapacity, . . ."

In determining whether employment has contributed substantially to incapacity, the trial court must evaluate the evidence in the exercise of its independent judgment. (Strumsky v. San Diego County Employees Retirement Assn. (1974) 11 Cal.3d 28, 34.) The trial court must find Unsubstantial evidence of a 'real and measurable' connection between the disability and employment, . . . The substantial contribution test 'would not include any contribution of employment to

(15)

disability, no matter how small or remote.' [Citation.]" (Bowen v. Board of Retirement (1986) 42 Cal.3d 572, 578.)

Thereafter, this court reviews the determination of the trial court pursuant to the usual rules of appellate review. That is, the judgment must be upheld if it is supported by substantial evidence. (Wieser v. Board of Retirement (1984) 152 Cal.App.3d 775, 783.)

2. Substantial evidence supports the trial court's finding that Waldron-Shah suffered no permanent incapacity as a result of the traffic and elevator accidents.

Waldron-Shah contends the trial court did not give the proper weight to medical evidence which indicated she suffered disability due to the traffic and elevator accidents. She relies on the medical reports of Dr. Leopold S. Tuchman dated May 5, 1971, which indicated Waldron-Shah had an irregular cardiogram and cardiac ischemia, and upon the report of Dr. Dimitroff, quoted by Tuchman, in

which Waldron-Shah complained of chest pain which worsened with movement or driving. Tuchman concluded the traffic accident had caused a myocardiac contusion which was aggravated in the elevator accident. Tuchman concluded Waldron-Shah would need "periodic lifetime evaluations" of her cardiac neurosis and continuation of her symptoms will lead to a heart attack. Further, because these symptoms commenced with the traffic accident, Tuchman concluded they were completely work related.

(16)

Dimitroff examined Waldron-Shah on October 22, 1968, scheduled a second electrocardiogram but Waldron-Shah did not keep the appointment. Dimitroff saw Waldron-Shah again on February 17, 1969. He concluded the irregular heartbeat she then experienced could not be attributed to the traffic accident because the time interval between the accident and the symptom had been too great.

Finally, Waldron-Shah relies upon a letter from the County's Officer of the Director of Personnel dated October 23, 1973, which informed Waldron-Shah's superior, the Director of the Department of Urban Affairs, that restrictions on her work activities, i.e., no freeway driving and avoidance of stress, precluded her usual duties. The author recommended the filing of "a Disability Retirement Application on behalf of Miss Shah, as provided by Section 31721 of the County Employee's Retirement Law of 1937."

However, Waldron-Shah was not discharged because of the work restrictions alone. Rather, as pointed out in the County's release letter, Waldron-Shah by that time had advised the County she suffered from Lupus and could only work on a part time basis as her condition permitted. Because no such job existed she was released.

Moreover, Moss, the medical consultant to the Board,

reviewed the reports of 11 physicians who had treated Waldron-Shah prior to March 26, 1974, and concluded from an orthopaedic standpoint, she is not disabled and should be able

(17)

to continue her usual and customary interesting work activities." Moss also wrote, "There is little objective evidence to support a physical disability. Her main problem appears to be her anxiety about working under pressure on her job.

Moss's conclusion that Waldron-Shah suffered no orthopedic disability related to the traffic and elevator accidents is preceded by an exhaustive review of the reports of all physicians who had examined her up to that time. Clearly Moss's report and its conclusion constitutes substantial evidence Waldron-Shah was not rendered disabled as a result of the accidents apart from her Lupus condition.

Waldron-Shah's claim the trial court erroneously failed to find a physical disability apart from the Lupus condition therefore fails.

3. Substantial evidence supports the trial court's conclusion Waldron-Shah did not demonstrate her employment contributed to her Lupus condition.

Waldron-Shah next argues her disability is service connected because she performed her duties without physical restrictions before the accidents and only thereafter, suffered a disability. She argues industrial aggravation of a pre-existing condition is a sufficient nexus to service to warrant a service connected disability. She claims an employer takes his employee as he finds him and any acceleration or aggravation of a preexisting disability becomes

(18)

a service-connected injury of that employment." (Gelman v. Board of Retirement (1978) 85 Cal.App.3d 92, 96.)

Waldron-Shah argues the traffic and elevator accidents "set into motion a series of physiological changes that were not immediately recognizable, but were later identified as the onset of a lupus condition that previously had been dormant and non-disabling."

Unfortunately, Waldron-Shah's best argument is the claim that because she did not suffer from Lupus before the traffic and elevator accidents, those accidents must have triggered the condition. The trial court concluded this cause and effect argument did not constitute evidence that Waldron-Shah's employment had contributed substantially to her disability.

Moreover, despite Waldron-Shah's reliance on Shapiro's report, it is equally as likely Waldron-Shah's Lupus condition developed coincidentally with the traffic and elevator accidents but that these accidents did not substantially contribute to the condition. Indeed, the evidence showed Waldron-Shah resumed her normal duties after the traffic accident and resumed intermittent duties after the elevator accident. As the trial court pointed out, Shapiro offered no other support for his conclusion of causation other than the bald assertion that one followed the other.

Moreover, although the traffic accident clearly constituted a traumatic event, accounts of the elevator

accident were conflicting. In one, the elbow of a large man struck Waldron-Shah in the chest. In another, she merely stumbled into the elevator after ingesting a hearty lunch and climbing some steps. It seems obvious, at least in the

latter version, that Waldron-Shah's then incipient Lupus could have caused the elevator accident, rather than the elevator accident causing the Lupus as she claims. Because Waldron-Shah failed to bear her burden of proof that her disability is service connected, the trial court's reasoning to the contrary is supported by substantial evidence and must be affirmed.

4. Notwithstanding the foregoing, Waldron-Shah's claim is barred on the basis of laches.

At the June 11, 1986 hearing the County made an oral motion to dismiss the disability claim based on laches. The referee implicitly rejected this defense and ruled on the merits of Waldron-Shah's claim. The Board again raised this defense in response to the petition for writ of mandate and again the finder of fact ruled on the merits.

On appeal, the Board once more asserts Waldron-Shah's delay as a reason to rule against her.

Ordinarily, this court does not view defenses based on delay favorably, especially when they are asserted against a party who concededly has suffered a disability. However, on the facts of this case, it is clear the Board's ability to defend Waldron-Shah's claim of service connected disability has been prejudiced by her delay.

(20)

Waldron-Shah last worked for the County on September 12, 1969. Despite her successful conclusion of a Worker's Compensation claim in 1973, she did not file a petition for disability retirement until 1974. She filed that application based solely upon the traffic and elevator accidents of 1968 and 1969. However, at the first hearing, she testified her Lupus condition was diagnosed in 1971 or 1972. The Continuation Sheet for Disability Determination dated December 23, 1974, referred to her Lupus condition, and

the Ross-Loos summary of her condition mentioned she had been treated for Lupus related conditions with steroids in July, 1974.

Despite this documented knowledge of Lupus by at least 1974, Waldron-Shah failed to amend her application for disability retirement to include that condition as a ground for disability.

Meanwhile, Waldron-Shah went to England in 1976 and took no action whatsoever on her disability claim until a prehearing conference on December 11, 1984. When Waldron-Shah appeared at that hearing, the referee admonished her respecting her obligations to move the case forward. Nonetheless, nothing further happened in the case until the referee wrote to Waldron-Shah on April 6, 1986, to inquire about its status. In response Waldron-Shah sent the Board medical records, and a hearing was set for June 11, 1986.

At that hearing the County objected to evidence of Lupus based disability. The referee agreed the application did

not mention Lupus and had not been amended to include that condition but nonetheless took the matter under submission.

When no recommendation issued, a second hearing was conducted on January 7, 1988. Again the County objected to the lack of notice as to the Lupus based disability and again the referee agreed the application had been deficient in this regard but reached the merits of the application.

The ability of the County to defend the claim was further exacerbated by Waldron-Shah's failure to present any expert testimony on the cause of her condition other

than reports of physicians which appear to have been prepared for purposes other than the instant hearings. This lack of tailored evidence was compounded by the fact Waldron-Shah did not seek counsel until after the Board issued its 46-page recommendation.

None of the delays was explained by either party and each side blames the other for the failure to set necessary hearings. None of the tribunals which heard this case objected to the murky state of the record and each tried to make the best of the evidence in the form in which Waldron-Shah presented it.

However, because a petitioner bears the burden of going forward and of proof, the delay in this case must be attributed to Waldron-Shah's inactivity. That inactivity rises to such an egregious level that equity demands her claim be rejected.

(22)

Waldron-Shah's failure to pursue this claim diligently, combined with her reliance on medical reports instead of expert testimony, has severely prejudiced the County's ability to defend this case. Because of the passage of time, the County would find it difficult, if not impossible, . . . to find medical authority competent to differentiate the causes of the impairment." (Duff v. City of Gardena (1980) 108 Cal.App.3d 930, 938.) We conclude the denial of Waldron-Shah's claim properly may be upheld based on her failure to prosecute.

CONCLUSION

Although this court has great sympathy for Waldron-Shah, the trial court's finding her disability is not service connected is supported by substantial evidence. Moreover, Waldron-Shah's delay in the prosecution of her claim has caused prejudice to the County such that it should be denied on that additional ground.

DISPOSITION

The judgment is affirmed.

The County to bear costs on appeal.

NOT TO BE PUBLISHED

KLEIN, P. J.

We concur

DANIELSON, J. CROSKEY, J.

Rule 14.1.k.ii

Other Opinions, Orders, Findings of Fact and Conclusions in Law by Court s and Administrative Agencies

SUPERIOR COURT OF CALIFORNIA, COUNTY OF LOS ANGELES DEPT. 85

DATE March 07, 1990

HONORABLE JOHN ZEBROWSKI JUDGE

C 700717
Diane L. Waldron-Shah
v s

Board of Retirement of the County of Los Angeles
Employees Retirement Association

NATURE OF PROCEEDINGS.
MOTION FOR PEREMPTORY WRIT OF MANDATE
ORDER ON SUBMITTED MATTER

In this matter heretofore submitted on February 28, 1990, the court announces its decision as follows:

STATEMENT OF DECISION

1. In this case the court exercises its independent judgment. The petitioner is concededly disabled. The issue for the court is whether her disability has been shown to be service-connected according to applicable legal standards (see further discussion in paragraph 3, below).

2. The evidence of petitioner's car and elevator accidents does not establish that the injuries sustained in those incidents, standing alone and without the Lupus complication, caused a disability. Several of the doctors treating petitioner prior to the Lupus diagnosis seemed perplexed at petitioner's symptoms and complaints, attributing them variously to "neurosis", "emotion" and "anxiety" and finding them not indicated by any objective finding.

Later, after the Lupus diagnosis, it becomes clearer why petitioner would have those symptoms and complaints even though objective evaluation of her accidental injuries would not indicate such problems. The evidence indicates that the Lupus condition (which, according to the evidence, can attack joints and internal organs) is the cause of the disability rather than the accidental injuries.

3. Petitioner contends that her Lupus condition was either caused or aggravated by the stress of her

employment, and that her Lupus induced disability is therefore service-connected. In exercising its independent judgment in evaluating the evidence on this point, the court must look for a "real and measurable" or a "material and traceable" connection between petitioner's Lupus condition and her job. Although the court applies the independent judgment standard, that independent judgment is directed to locating "substantial evidence of some connection between the disability and the job." The test requires proof that the job made a "substantial contribution" to the disability. Bowen v. Board of Retirement, 42 C3 572, 578 (1986).

(2)

(4. The primary evidence offered to establish a substantial connection between petitioner's Lupus and her job are the report (Ex. 2 2) and letter (Ex. 5) of Dr. Shapiro. This evidence does not evaluate petitioner's particular job circumstances, describe the connection between those circumstances and the onset or aggravation of petitioner's Lupus condition, or explain the specific basis for an opinion of such a connection. Instead, the evidence of Dr. Shapiro states somewhat generally that Lupus can be aggravated by stress, a view which -- if not conceded -- is at least not strenuously contested. The court is thus left with two options. One is to conclude that since Lupus can be aggravated by stress, anyone who has Lupus and can demonstrate previous job stress has established a substantial connection between their job and Lupus. Such a conclusion would be at least close to, if not completely, a conclusion that Lupus in a previously employed individual is virtually always service-connected since virtually all jobs involve stress to some degree. The court's second option is to search for specific evidence that this case of

Lupus has a substantial connection to this job.

(3)

The latter seems the correct analysis in view of the language in Bowen, yet the record presented contains no evidence sufficient to establish that petitioner's job made a substantial contribution to her Lupus condition. Dr. Shapiro's 11/21/89 letter merely states his conclusory opinion that petitioner's accidents plus the stress of her job aggravated her Lupus condition. There is no way the court can evaluate the "substantiality" of this conclusory opinion; it can only accepted on faith or rejected as unsupported. Since the law does not provide for mere acceptance of opinions on faith, and instead requires an evaluation of the evidence for the purpose of finding or not finding substantial evidence of the connection, the court cannot properly merely accept Dr. Shapiro's bald conclusion that the connection exists in this case. The court has considered and receives in evidence petitioner's Ex. 5 (Dr. Shapiro's 11/21/89 letter), but in view of the foregoing, it has no material impact upon the courts decision.

5 The petition for writ of mandate is denied. Respondent to prepare judgement.

(4)

CASE NO. C700717

JUDGMENT DENYING
PEREMPTORY WRIT OF MANDATE

This matter was heard on February 28, 1990 in Department 85 of the Superior Court of the State of California for the County of Los Angeles, the Honorable

John Zebrowski, Judge, presiding. The petitioner was represented by Lemaire & Faunce, by Mark Singer, and the respondent was represented by De Witt W. Clinton, County Counsel, by Rosanne Wong, Deputy County Counsel.

The administrative record having been received into evidence, written and oral arguments having been presented and the matter having been submitted for decision, IT IS HEREBY ORDERED, ADJUDGED AND DECREED that the Petition for Writ of Mandate filed in this matter is denied. The Parties shall bear their own costs.

DATED: March 15, 1990

JOHN ZEBROWSKI
Honorable John Zebrowski, Judge

THE RECOMMENDATION OF

REFEREE MARK BURSTEIN

TO THE BOARD OF RETIREMENT
OF THE LOS ANGELES COUNTY
EMPLOYEE'S RETIREMENT ASSOCIATION

IN THE MATTER OF THE APPLICATION FOR
DISABILITY RETIREMENT OF

DIANE LYNN WALDRON-SHAH
APPELLANT

SUMMARY OF EVIDENCE
FINDINGS OF FACT
CONCLUSIONS OF LAW
RECOMMENDATIONS

DATED: JUNE 3, 1988

COUNTY OF LOS ANGELES
EMPLOYEES RETIREMENT ASSOCIATION

In the Matter of the Application for
Disability Retirement of
DIANE LYNN WALDRON-SHAH
Applicant

SUMMARY OF EVIDENCE,
FINDINGS OF FACT,
CONCLUSIONS OF LAW
RECOMMENDATIONS

INTRODUCTION

The matter of the application for disability retirement of Diane Lynn Waldron-Shah, hereinafter called Applicant, was heard on June 11, 1986 by Referee Donald H. Black and on January 7, 1988 by Referee Mark Burstein. Applicant represented herself 1/ and the Board of Retirement, hereinafter called the Board, was represented by Wayne Parrish, Senior Deputy County Counsel for the County of Los Angeles, hereinafter called the County.

Applicant took the position that she was disabled as a result of 1) an industrial automobile accident which caused orthopedic problems to her back, neck, sternum and a cardiac condition; 2) an industrial elevator accident which caused cardiac difficulties and aggravated her sternum condition, 3) Lupus which was caused by her industrial accidents; and 4) industrial stress which aggravated her Lupus and heart condition. The Board took the

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1/ Yvonne Gartsman from the Lupus Foundation accompanied Applicant at the January 7, 1988 hearing.

positions that Applicant's application included only the allegations of orthopedic and internal conditions and that, in the alternative, there was no medical evidence fro any examining physician concerning her Lupus condition. At the January 7, 1988 hearing, the Board agreed to send Applicant to a physician for an examination of her Lupus and an examination was subsequently scheduled for January 16, 1988. However, Applicant did not keep this appointment and another examination was never scheduled.

SUMMARY OF EVIDENCE

Witnesses Called By Applicant

None 2/

Witnesses Called By The Board

None

2/ No witnesses were called by either party on June 11, 1986 or January 7, 1988. While Referee Black swore Applicant in on June 11, 1986 and asked her some questions concerning the nature of her case, her testimony was cursory and limited because of issues that arose. At the January 7, 1988 hearing, an additional day of hearing was scheduled for January 15, 1988 to enable Applicant to testify and present whatever additional evidence she wished to offer, but Applicant canceled that hearing due to illness. Following the exchange of several letters, both parties decided that the case was to be submitted without calling any witnesses

Exhibits offered By Applicant 3/

Exhibit 1 Written statement of Applicant submitted at the January 7, 1988 hearing 4/

Applicant wrote that she believed that the precipitating causes of her disability were an automobile accident and an accident in an elevator, both of which were industrial. She stated her left leg was "now partially nerve dead, with a loss of reeling, reflexes and strength" and that she still had episodes of sciatica pain on the right side and leg. Applicant wrote 1976 she was in traction in England and thereafter in physiotherapy for about a year. She was able to walk normally but if she stepped on an uneven surface on her left leg, she fell.

Applicant wrote that almost immediately after these accidents numerous symptoms of Lupus began and that the disease continued to worsen with_t, additional symptoms each year. She wrote that the disease effected her heart, blood, eyes, sight, kidneys, central nervous system, liver, mucus membranes, Castro intestinal tract, lungs, castocondral junction, mouth, throat, ears, nearing, skin, vascular system, lymph glands, muscles, joints

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3/ Some documents in support of Applicant application were received at the June 11, 1986 hearing but were not specifically marked. However, at the January 7, 1988 hearing, they were all marked and received into evidence and are summarized herein.

4/ Since Applicant did not testify, I have summarized Applicant's written statement; however, it should be noted that the statement was not made under oath.

and bones; she also experienced chills, fever, depression, fatigue, drowsiness and weakness. 5/

Applicant wrote that extreme work stress aggravated her Lupus conditions. She alleged that the work stresses were as follows:

1) Gross overwork in 80 and 90 hour weeks, because there was totally inadequate time given to prepare the Federal applications and I was throughout the time I was with the County, the only professional in the field of socio-economics. (The rest of the staff were political appointees and administrative personnel.)

2) My struggle against corruption in the awarding of contracts for the use of the Federal funds, for which I had titular responsibility, but over which I had no actual control.

3) The threats and pressures brought upon me by the Board of Supervisors' people trying to make me sign false statements for the US Government saying work was completed on the Federal contracts which had not even been begun because the firms involved were totally unable to the work (sic), or there was some other form of misappropriation of the funds.

4) The appeals for help made to me by the pretty young Chicano secretaries who were being taken by

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5/ In this statement, Applicant specified numerous medical diagnoses, opinions and conclusions. However, since Applicant is not medically qualified to make those statements, they have been omitted. Any diagnoses, opinions and conclusions of medical experts recited by Applicant are included in the summaries of the reports that were submitted.

our director, Bill Bond, a political appointee, to the apartment in Monterey Park of his young administrative assistant, and there used sexually. This was often happening several times a week. They even took me there once and made advances, which I walked out on, but not before I saw with my own eyes that the men were taking the young secretaries into the bedrooms (it was after this that the girls began appealing to me for help, because I knew they were not making the story up.) Alas there was no one to appeal to since this was at the Board of Supervisor level and in those days the only way for a girl to escape such a situation was to quit the job and so get a bad Mar on her career record and disappoint her family. After the secretaries had been used for a while at that level they would be handed on down for use by the directors in lesser County departments. The Mexican-American girls were the prime targets because they came from families with strict moral standards and were too ashamed to ever tell what had happened to them in their supposedly enviable jobs.

Exhibit 2 November 11, 1987 report of Howard Steven Shapiro M.D. addressed "To Whom It May Concern"

After Dr. Shapiro set forth his qualifications and expertise in Systemic Lupus Erythematosus, hereinafter called Lupus, he wrote the following:
I have carefully reviewed the detailed medical history of Ms. Waldron, along with valid copies of prior medical reports dating back to as far as 1969. I am satisfied that

she meets all established criteria for the extent of Systemic Lupus Erythematosus. She requires careful medical monitoring and care for this often fatal chronic disorder, which has often been called the great masquerader. The later term applied since (Lupus) results from a disordered immune system wherein for unknown reasons the victim develops antibodies against the tissues of their own body; any organ may come under attack or involvement. Almost any system in the body may become disordered, despite an often healthy appearance in the patient, not infrequently the internal organs such as the brain, heart, kidneys, bone marro (sic) and blood forming systems and gastrointestinal systems become involved. Not infrequently, muscles, joints, tendons, and skin become involved as does all mucus membranes in the body. Commonly, the blood vessels become inflamed with edema of vital organs. When the Lupus process involves the central nervous system, as well as the peripheral nervous system, patients may develop dementia, chronic brain disease, psychosis, epilepsy, seizures, stroke, blindness, deafness, severe pain syndrome, paralysis and all sorts of impairments of intellectual functioning.

Most all cases of (Lupus) require the use of high doses of cortisone, anti malarial drugs, anti-inflamatories and various other medications determined by what organ system is involved by the Lupus process. Not infrequently, many systems become involved and many different medications become necessary in the treatment. The side effects of the different medications are frequent and often complicate and compromise the welfare of the Lupus patient. in extreme cases, anti-cancer drugs are used

notwithstanding their toxic effects.

(6)

Stress of all sorts, especially on going acute and unremitting stress exacerbates the Lupus process. Stress and stressors clearly are detrimental with most illnesses, however, they are even more so with Lupus. Because stress works directly upon the endocrine-immune system, the Lupus patient has minimal reserve or capacity to cope with stress, thereby deteriorating medically with those stresses that most people ordinarily hold up under. Often, as in Dr. Waldron's case, the Lupus patient who now deteriorates rapidly and severely (sic) under seemingly ordinary stresses, gives a clear and reliable history of their pre-illness hardiness which is often confirmed and reaffirmed by friends and family as well as employers. I am struck that in my experience of over 1,000 patients with (Lupus), that I have examined in depth, that prior to their illness, they were described as extremely independent, competent, self-reliant, strong, durable, healthy,self-sufficient and able to stand up to and under enormous amounts of stress.

Dr. Shapiro wrote that he reviewed medical reports concerning applicant's condition as far back as 1969 and he concluded that they revealed "a severe multi-system progression of her Lupus beginning in early 1968 and involving her cardio-vascular system, bone marro (sic) and central nervous system". Her records revealed numerous hospitalizations and that, as early as 1973, she developed diminished vision secondary to inflammation of her optic nerve due to Lupus. Or. Shapiro concluded that almost all of her organ systems had since become involved, including

her cardiopulmonary system. Or. Shapiro noted that Applicant also experienced kidney and liver dysfunction, inflammation of the

(7)

arteries causing headaches, Raynaud's Syndrome and Sjogren's Syndrome whereby all mucus membranes dried up resulting in painful ulcerations and infections. Applicant also experienced "painful arthritis-like joint involvement, muscle involvement with weakness and tenderness to the touch", marked fatigue, lack of stamina, impaired capacity to control her body temperature, sleep disorders and skin rashes.

With regard to Applicant's emotional condition, Dr. Shapiro wrote the following:

> Lupus patients are frequently depressed and anxious, and as mentioned before, quite vulnerable to stressors. Much of their security is obtained in restoring a sense of self control and self determination in their lives. The security, they feel, about their home is central to their well being. Most Lupus patients eventually take great pride in continuing to cope and survive, and to continue on, notwithstanding what is obviously an overwhelming and limiting medical condition. Their dignity and self respect comes from their prevailing over their handicap much as it is with many other types of handicaps. In Lupus, however, unlike other conditions, stress overwhelms them and exacerbates all their symptoms.
>
> It is my professional opinion that the one-going stress of eviction will exacerbate her medical

condition to a dangerous degree. The notion in Dr. Waldron's mind is that to be put out in the street within five days is overwhelmingly frightening (sic). Furthermore, I am in complete agreement with her statement, that her poor physical health prevents her from any physical activity such as

(8)

moving. Keep in mind that Dr. Waldron was an established and renowned (sic) photo-journalist, published authoress and researcher for many years prior to the onset of her Lupus, and further that she has acquired during the 30 years of her work all around the world, voluminous data files, cabinets filled with research writings and rather large technical libraries.

A careful sychosocial evaluation and -medical status examination confirms my impression that Dr. Waldron is a rather anxious and depressed woman, who is coping in a marginal fashion considering her current stressful situation. She is alert, articulate, intelligent, cooperative and quite clear and concise in her communications. My impression is that she is honest and truthful, resourceful and desperate. I have no reason to doubt the validity and veracity of her statements.

I would strongly request all consideration be given to this very worthwhile woman so as to prevent eviction from her apartment or any forfeiture later. I believe that she is incapable of handling the overwhelming stress associated with the eviction process and that further legal actions and/or eviction

will exacerbate her existing medical condition dangerously.

Exhibit 3 Photographs of Applicant

(9)

Exhibit 4 January 21, 1985 Attending Physician's Statement of Santa Monica Eye Medical Group

On this unsigned, pre-printed form, a box was checked reflecting a diagnosis of "Keratitis Sicca".

Exhibit 5 Rejected

Exhibit 6 March 20, 1987 Attending Physician's Statement of Santa Monica Eye Medical Group

Dr. Gross checked the pre-printed form to reflect a diagnosis of "Neuritis".

Exhibit 7 Rejected

Exhibit 8 March 25, 1987 Attending Physician's Statement of Santa Monica Eye Medical Group

Dr. Gross checked the pre-printed form to reflect a diagnosis of "Conjunctivitis".

Exhibit 9 April 17, 1987 report Jay Gross, M.D. addressed
"To Whom It May Concern"

Dr. Gross reported that Applicant had been his patient since 1984 and that Lupus had been diagnosed. Dr. Gross

wrote that -

(10)

Lupus is a disease of the immune system which could be aggravated by stress. Dr. Gross wrote that he was concerned because Applicant's eyes appeared to be affected and he recommended that Applicant's stress be reduced.

Exhibit 10 June 12, 1986 Billing Statement completed by Chipp St. Kevin Miller, M.D.

On a pre-printed form, Dr. Miller wrote that his diagnosis was "pharyngeal edema".

Exhibit 11 September 11 and 16, 1986 Billing Statements of Ada R. Wolfson, M.D., F.A.C.P.

On pre-printed forms, Dr. Wolfson wrote the diagnoses of Lupus, chest pain and dyspnea.

Exhibit 12 Various Forms of the Royal Free Hospital from 1976- 1977

Exhibit 13 September 8, 1977 report of J.C.A. Magwick

Dr. Magwick reported that on October 15, 1976, Applicant reported to the emergency room complaining of low back pain; two weeks earlier, she had injured her back while lifting a typewriter. There was a radiation of pain down the back of her left leg to the big toe and down her right leg to the calf. Applicant reported that she had had intermittent backache and sciatica following an

(11)

automobile injury eight years earlier. Examination revealed a moderate amount of back spasm with limitations of active movement and a limitation of straight leg raising.

Applicant was seen again on October 23 and 25. There was marked spasmodic curvature of the lumbar spine with considerable restriction of active movement. Straight leg raising was 20 degrees on the left and 70 degrees on the right with positive sciatic stretch tests. The left ankle jerk was absent and there was weakness of upward and outward movement of the left foot. X-r.ay showed a narrowing of the lumbosacral disc space. Applicant was put in traction until October 29, 1976.

On November 2, 1976, Applicant was examined by Professor P. K. Thomas, a consulting neurologist, who reported evidence of irritation of the left fifth lumbar nerve root, presumably h recurrent disc lesion. Applicant's condition improved and she was released from the hospital shortly after November 12, 1976.

Exhibit 14 December 23, 1974 Disability Determination of T. Pope 6/

Pope wrote that medical evidence 7/ revealed that Applicant had Lupus as evidenced by persistent and recurrent

6/ There was no identification of T. Pope's employer or position. However, another exhibit, Applicant Exhibit 34, was sent to Pope at the Department of Health's Disability Evaluation Program.

7/ Pope listed December 13, 1974 reports of Los Angeles Ross Loos Hospital and Van us Ross-Loos Hospital; those reports are summarized below as Applicant Exhibit 34 and applicant exhibit 37 respectively.

(12)

pericarditis, joint pain, abdominal pain, renal calculi, facial rash, and fevers. He also wrote that she had been involved in elevator and automobile accidents which caused trauma to a lumbar disc with resultant sciatica. Pope concluded that despite tries findings, "(Applicant) retains the functional capacity to do her usual sedentary work as a research analyst" and he wrote that disability was denied.

Exhibit 15 April 25, 1968 memorandum to Stewart Marsh from Jim Harrigan

Harrigan requested mileage expenses for Applicant because she used her car for after hours meetings, weekend interviews and evaluation visits.

Exhibit 16 Photographs of Applicant

Exhibit 17 June 30, 1969 letter to Applicant from Sanford R. Goodwin

Goodkin 8/, the President of a research corporation, wrote about his negative experiences in dealing with the County people.

8/ It appeared frown the evidence that Goodkin was a private contractor with whom Applicant dealt.

(13)

Exhibit 18 Duty Statement for Research Director, Community Improvement 9/

The duties of Research Director 10/ were set forth.

Exhibit 19 April 11, 1969 letter to Gordon T. Nesvig, director of Personnel from Roy Hoover, Director of Urban Affairs

Hoover wrote that from March 20, 1968 to the date of the letter, Applicant worked in the Community Analysis Program which was the basic community improvement research and development program from which other programs were planned and initiated. While Applicant held the position of Research Analyst, she was performing the duties of and nod the higher level responsibilities of a Senior Community Improvement Analyst.

Hoover wrote this letter to assist Applicant in meeting the minimum qualifications in order to take a promotional examination.

Exhibit 20 Applicant's September 24, 1968 memo regarding Goodkin Research corporation

Applicant wrote her opinions concerning whether Goodkin should be awarded a contract.

9/ At the hearing, I reserved ruling on the admissibility of this exhibit. In a July 1, 1987 letter to Referee Black, Applicant Exhibit 27(a), Applicant wrote that although she was performing these duties, the position was never funded. It was not clear who drafted this document and/or whether it was ever approved. Accordingly, Exhibit 18 is rejected.

10/ Applicant's job classification was Research Analyst.

Exhibit 71 Criteria For Evaluating Research Consultant Bids For the C.A.P.

At the hearing, I reserved ruling on the admissibility of this exhibit. Since Applicant failed to explain the relevance and I see none, it is hereby rejected.

Exhibit 22 Procedures For Handling Consultant Bids

At the hearing, I reserved ruling on the admissibility of this exhibit. Since Applicant failed to explain the relevance and I see none, it is hereby rejected.

Exhibit 23 February 4, 1969 memo from Applicant regarding Research Capability For Urban Affairs Department

Applicant complained that the newly created Urban Affairs Department did not have a social scientist or researcher at the Ph.D level. She set forth her reasons for the needs of such a position.

Exhibit 24 September 10, 1975 transcript of September 10, 1975 broadcast.

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Exhibit 25 February 20, 1969 report of Sim P. Dimitroff, M.D.,

Dr. Dimitroff reported the results of his February 17,1969 examination of Applicant 11/. Dr. Dimitroff had previously examined her on October 22, 1968 regarding her lay 14, 1968 automobile accident and his diagnosis at that earlier time was that "there were slight, mild non-specific

changes of a non-disabling nature"; Applicant nod had a return appointment in six weeks for follow-up tests butt she did not keep the appointment. Dr. Dimitroff reported that since the October, 1968 examination. Applicant continued to perform the same duties as "researchdirector, community improvement" with the title of Research Analyst. He described her duties as follows:

> Her duties consist of preparing over all research design for community analysis program, planning, initiating and directing studies of community improvement needs. She prepared evaluations of various community improvement programs in relation to community needs, and prepared research design and administered socio-economic diagnostic surveys. She consulted and advised heads of community improvement sections in design and conduct of research and analysis projects. She established standards and criteria for evaluating research programs and prepareing research reports and supervised the work of private consultants in carrying out research contracts. 12/

11/ Apparently, Dr. Dimitroff examined Applicant after the February 14, 1969 elevator incident.

12/ It appeared that Dr. Dimitroff summarized the duties that appeared on the Duty Statement of Research Director, Community Improvement, Applicant Exhibit 18

Dr. Dimitroff wrote that Applicant reported continuous and intermittent skipping of the heart beat since the accident; she was unable to associate it with any stressful situations. Beginning in October, 1968, she had episodes of wakening at night with shortness of breath and after short periods of dyspnea, she was able to return to sleep. Applicant reported that on February 14, 1969, after eating a heavy lunch, she climbed a flight of stairs and then stumbled on an elevator triggering "a sensation of rapid, irregular heart action, weakness and uncomfortable sensation in the center of the chest". She was subsequently taken for medical treatment. She was not hospitalized and rested over the weekend.

Applicant submitted a written report to Dr. Dimitroff in which she described three areas of work stress. The first involved a contract that the County signed with the federal government to carry out a community analysis program; difficulties arose and the project was never completed. A second problem area was that her division was absorbed into a newly created Department of Urban Affairs with no provision being made for a research and development component; her position had been eliminated and she had to compete in the general ranks of the department. A third area of stress resulted from her having to conduct interviews for the Board of Supervisors with ten consulting firms for the performance of community analysis programs. She encountered difficulties because of the difference of opinions of the different supervisors.

In his "System Review" section, Dr. Dimitroff wrote that Applicant complained that she still had a backache and she

complained of light-headedness that was relieved by eating. With regard to her cardiac history, Applicant complained of ectopics especially over the weekend with a heavy sensation in her chest. He noted that Applicant worked 40 hours a week 13/, and that she did not take any work home on weekends and the amount taken home at other times was "very small".

Physical examination findings were essentially normal or were within normal limits. An EKG taken in February, 1969, when compared to the EKG taken in October, 1969, showed an inversion of the T-wave in leads V-3 and V-4. Dr. Dimitroff's impressions were "antero-septal myocardial changes and possible anoxia". While the blood count was essentially normal, the blood sugar was abnormally high,. Wintrobe sedimentation rate was moderately high and Lactic dehydrogenase was slightly high.

Dr. Dimitroff opined that there was a strong suspicion of coronary insufficiency but he noted that a final diagnosis would depend on further examinations and evaluations. He concluded that her current chest discomfort and EKG changes were not related to her May, 1968 accident since the time interval was far too long and she was able to return to her duties without any incapacity. With regard to the February 14, 1969 episode, Dr. Dimitroff concluded that the incident occurred after Applicant ate a heavy meal and climbed a flight of stair.s; he found no industrial connection. With regard to the alleged sources of stress, Dr. Dimitroff

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13/ However, he also wrote that she left her house at about 7:15 a.m. and did not arrive home until 6 p.m.; her workday was 8 a.m. to 5 p.m.

concluded that "at the time of her attack there was no direct inter-relationship between herself and any of the...three problems".

Exhibit 26 Nursing Care of the Lupus Patient

Exhibit 27 Documents selected by Applicant from package sent to Referee with case assignment

a) July 1, 1987 letter to Referee Black from Applicant

b) December 23, 1974 memo from T. Pope

See Applicant Exhibit 14.

c) June 30, 1969 letter to Applicant from Sanford Goodkin

See Applicant Exhibit 17.

d) April 4, 1973 report of Bernard Sosner, M.D.

Dr. Sosner reported his March 13, 1973 psychiatric evaluation and noted that her symptomatology waxed and waned after the February 14, 1969 elevator incident until she stopped working in September, 1969. Dr. Sosner reviewed her extensive medical file and noted that a great number of physicians agreed that Applicant

had extensive organic pathology and some felt that emotional factors were exacerbating her physical condition.

Her current symptomatology consisted of low back pain radiating down the left leg which periodically became

severe and pain in the anterior chest wren which she related to lifting, pulling and emotional tension. She also complained of paroxysmal nocturnal dyspnea and depression.

Applicant told Dr. Sooner that she was "the acting director of research and development for community improvement of the (County)" and that she worked closely with the Board of Supervisors. She reported that she was subjected to work stress resulting from political decisions from the Board of Supervisors that prevented her from doing her job and because federal -money was misappropriated and wasted. She also was subjected to stress because she was put in charge of quality control but was prevented from performing those duties by the conditions imposed by the Board of Supervisors.

Dr. Sosner opined that there was some indication of anxiety but not of significant depression. Or. Sooner opined that there were emotional factors "which probably have made (Applicant) more disabled than her injuries would have caused on a purely physical basis". He concluded that her psychiatric disability was a permanent and stationary and that "any significant psychiatric sequelae of the injuries have resulted in physical symptoms".

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e) May 5, 1971 report of Leopold S. Tuchman, M.D.

Dr. Tuchman reported his April 22, 1971 internal examination of Applicant. Applicant complained of nocturnal symptoms, shortness of breath and occasional anterior chest pain. She told Dr. Taken that she had been off work since September, 1969 because of her back and rib

symptoms. Applicant reported that she-worked for the County Board of Supervisors in a program to develop community improvement. Applicant claimed that her job required her to drive so much that she averaged eleven and a half hours of work a day, portal to portal. Because of work demands, she also worked about 20 weekends a year and five to six evenings each month.

Applicant reported that in her May, 1968, automobile accident, her chest struck the stick shift and ashtray; although she was wearing a seat belt, she ended up with part of her body beneath the air conditioner on the right side of the dashboard. Because of back, neck and anterior chest pain, Applicant was examined by Dr. C. L. Mitchell on May 16, 1968 and he diagnosed a mild concussion about the left temporal area, a cervical spine strain and a right hip strain. Applicant received some physiotherapy but when she complained of lumbar spine pain, she was referred to Dr. R. S. Watanabe on July 3, 1968. Applicant also thought that she injured her stomach or abdomen in the accident because she experienced pressure about the lower sternum; beginning in August, 1968, she received treatment at Ross-Loos for this condition. On October 22, 1968, Dr. Dimitroff evaluated Applicant

and after subsequent examinations and tests, Dr. Dimitroff made a diagnosis of "non-specific myocardial changes, slight and mild". Dr. Tuchman noted that reports written by Dr. Dimitroff after his February 20, 1969 report revealed that an electrocardiogram was abnormal; Dr. Dimitroff attributed Applicant's problem to an incomplete healing of the injury sustained in the automobile accident and subsequently aggravated by the injury in the elevator. Dr.

Dimitroff's reports also revealed that in April and May, 1969, Applicant continued to have a "band-like pain extending from the left parasternal area, the fourth interspace in the axilla" which was aggravated by "pressure", shortness of breath and some swelling of the fingers.

Physical examination revealed a straightening of the lumbar position of the vertebral column with the loss of anterior lordosis. The paravertebral muscles were spastic and tender, more so on the left. Bending at the waist was painful beyond 20 degrees and straight leg raise was painful at 40 degrees on the right and at 30 degrees on the left. Applicant experienced pain on flexion and left ankle jerk was absent. All other findings were normal or were within normal limits.

An EKG revealed a flattening of T3 and a lowering of the T waves in the aVF and L. In Vl, the T wave was inverted and the T wave in V2 and 3 was dyphasic. Dr. Tuchman opined that the non-specific T wave changes could have indicated some ischemia. Dr. Tuchman referred Applicant for a vectocardiogram and the results were normal. Therefore, he concluded that Applicant had not experienced an infarction.

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Based upon his review of the records, Dr. Tuchman opined that "there was sufficient tension-producing material in (Applicant's) life at work to bring about emotional reaction which could trigger coronary ischemia and thereby produce anoxia of the heart muscle". Dr. Tuchman then wrote that Applicant's symptoms were "undoubtedly at this late date due to the formation of a

fixed cardiac neurosis" as evidenced by the normal results of the vectocardiogram and enzyme tests. He opined that Applicant "in some manner utilized the two traumas as an organic expression of certain underlying anxieties and tensions partially pre-existing work in the character structure...and partially provoked and precipitated by the pressures at work. Her job was an extremely demanding one and it is not difficult to envision these pressures producing much anxiety in an emotionally overwrought individual". 14/

Dr. Tuchman opined that Applicant's coronary condition was permanent and stationary and that there was no apparent serious chronic damage to the heart muscle. Dr. Tuchman wrote that a continuation of the symptoms of her cardiac neurosis would produce "permanent, real changes in the coronary circulation with ultimate coronary insufficiency and myocardial damage that will go on to inevitable infarction". Dr. Tuchman opined that Applicant's condition was industrial in origin because she had no cardiac symptoms before her industrial injuries.

14/ Dr. Tuckman's letterhead reflected that his specialty was internal medicine and rheumatic diseases.

f) Duty Statement

See Applicant Exhibit 18.

g) April 17, 1987 report of Jay Gross, M.D.

See Applicant Exhibit 9.

h) June 12, 1986 Billing Statement completed by Chipp St. Kevin Miller, M.D.

See Applicant Exhibit 10.

i) June 23, 1987 letter to Applicant from Referee Black

Exhibit 28 Applicant's partial journal for 1969

Applicant submitted some of her handwritten logs for the period from March 25 to November 24, 1969, some of which were illegible. Applicant set forth some of her duties, physical difficulties, and her opinions and criticisms about the people and companies with whom she worked.

Exhibit 29 December 30, 1987 letter of Applicant from Jan Barcus

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Exhibit 30 October 30, 1984 letter to Applicant from Referee Black

Exhibit 31 July 10, 1987 letter to Applicant from Referee Black

Exhibit 32 January 28, 1986 letter to E. C. Morris from Applicant

Exhibit 33 Undated Employer Report of Injury

Applicant's February 14, 1969 injury was reported. The report stated that "(Applicant) was returning from lunch, was
bumped by large man in elevator, told accompanying friend

she felt she was having a heart attack, and slumped over".

Exhibit 34 December 13, 1974 letter to Tom Pope, Disability Evaluation Program, Department of Health, from Barbara M. Byler, Medical Secretary, Ross-Loos Medical Group

Byler wrote that Applicant was seen on December 3, 1974 by a rheumatologist; Applicant was given Plaquenil and then Prednisone for her Lupus condition. On December 10, 1974, Applicant was seen in Ophthalmology with complaints of frequent pain behind the left eye, especially when moving her eyes; she also had a strange taste in her mouth which was considered a symptom

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preceding an outbreak of the Lupus lesions. Byler wrote that Applicant had to be seen regularly for her Lupus condition.

Exhibit 35 November 15, 1974 report of Donald S. Fiegenberg, M.D.

Dr. Fiegenberg reported that Applicant was admitted to Ross-Loos on October 28, 1974 for an outbreak of Lupus; she was discharged on November 13, 1974. Dr. Fiegenberg wrote that Applicant's "maternal sister, cousin and grandmother died at ages 16, 23 and 32, respectively, of 'systemic disease', probably (Lupus)".

Exhibit 36 Undated letter to Constance Straw, M.D., Disability Evaluation Program, Department of Health, from Barbara M. Byler, Medical Secretary

Byler reported on Applicant's October 28 to November 13, 1974 hospitalization.

Exhibit 37 February 13, 1973 letter of Janet E. Adams, Medical Secretary of Ross-Loos Medical Group

Adams wrote that Applicant was seen on August 16, 1972 and stated that she had been in a May, 1969, automobile accident. She reported that since the accident, she had low back pain and sciatica, right and left; on August 16, Applicant was experiencing left leg sciatica. X-rays revealed a narrowed L5-51 disc space. Recommendations were bed rest, Parafon Forte and Williams

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exercises. An October 26, 1976 electromyelogram of both lower extremities was normal.

Exhibit 38 December 13, 1974 letter to Disability EvaluationProgram from Janet E. Eggert, Medical Secretary of Ross-Loos Medical Group

Eggert reported essentially the same information contained in Adams' February 13, 1973 letter concerning Applicant's August 16, 1972 examination. In addition, X-rays taken on August 16, 1972 revealed lumbarization of 51 and an increased lumbar lordosis; a possible sacralization of L5 could not be ruled out.

On September 4, 1973, Applicant returned with complaints of "renal" pain; X-rays revealed a renal calculus in the right ureter at the neck of the bladder. On December 21, 1973, Applicant was seen for multiple joint pain and a fever of 101. Applicant reported a family history of Lupus,

previous flare-ups of joint pain and that the episodes were becoming more frequent in intense sunlight. Physical examination revealed Applicant to be without fever.

Exhibit 39 May 11, 1973 report of Robert Roback, M.D.

Dr. Roback reported his May 9, 1973 examination of Applicant. Applicant reported that she still had periodic pain in the anterior rib cage which was caused or aggravated by physical activities such as lifting, pushing and pulling. She still had left low back pain which radiated into the lateral aspect of the

(27)

left thigh and down to the lateral aspect of the left leg. Back pain was worse when she remained in one position for too long of a period of time and sneezing aggravated her pain. When driving a car, she experienced spasms in the low back and in the lower extremities; she had sharp pain in the back while straining at stool and with intercourse. There was tenderness and stiffness in the back and a marked weakness in the lower extremities; Applicant reported falling because of "giving way" of her lower extremities. There was a tendency for the left second toe to bend down and she tended to stumble over it. Applicant experienced dizziness with certain head positions.

Physical examination of Applicant in a standing position revealed slight tenderness of the dorsal and lumbar muscles, pain in the right low back when stepping up to the table on the left and when the Left foot was weight bearing. On flexion of the thoraco lumbar spine, Applicant brought her fingertips to within three inches of the floor with a complaint of pain in the right low back;

extension was 25% of normal with a complaint of pain in the left lower extremity and although rotation was 100, Applicant complained of pain in the low back. In the reclining position, straight leg raising was positive at 45 degrees on the right and 60 degrees on the left with pain in the low back. Lesegue's, Jarring and Ely's tests were positive with pain in the low back. Neck and right hip flexions were positive with pain in the low back. Digital pressure was positive with tenderness of the right low back. Thoraco-lumbar hyperextension was positive with pain in the left anterior chest. Sitting straight leg raising was positive on

(28)

the left with pain in the left low back. All other findings were normal or were within normal limits.

Neurological examination revealed that the ankle reflexes were weakened, that there was weakness of dorsi-extension and plantar flexion of the toes of the left foot and the left ankle, and that there was weakness of inversion and oversion of the left foot. Dr. Roback noted that there "was some inconsistency in (Applicant's) performance".

Examination of Applicant's neck and upper extremities revealed tenderness of the junction of the cervical and thoracic spine area. Extension of the cervical spine was 50% of normal without pain; left lateral bending and left rotation were 75% of normal with pain. Rotation of Applicant's torso while sitting was positive with pain in the left upper back; cervical spine compression was positive with pain in the neck. All other findings were normal or were within normal limits.

X-rays of the cervical and lumbosacral spine revealed no evidence of fracture or dislocation but did reveal a slight narrowing of the lumbosacral disc space.

Dr. Roback's diagnosis was as follows:

As before, 15/ and apparently associated with a post-traumatic anxiety neurosis.

Dr. Roback opined that Applicant's orthopedic condition was permanent and stationary. He rated her subjective factor of

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15/ Although Dr. Roback previously examined Applicant, no prior report was introduced into evidence.

low back pain as slight, becoming moderate at times; her subjective factor of neck pain did not exceed slight and her subjective factor of chest pain was rated as slight. Dr. Roback concluded that Applicant was capable of working but was limited to light work. Dr. Roback wrote that "the emotional make-up of (Applicant) and her anxiety neurosis is productive of the magnification of her subjective complaints and interference in physical performance. However, since the anxiety neurosis appears to be a result of her injuries at work, just as the physical disability is a result of those injuries, there appears to be no reason for attempting to make a separation in rating the factor of pain or in advising work restrictions". 16/

Exhibit 40 March 31, 1973 report of Ronald R. Koefler, M.D. 17/

Dr. Koefler reported that he had been seeing Applicant

once a week in supportive therapy and that Applicant "continues to be convinced that she is physically disabled, although there is little evidence for this in her medical and hospital reports (which I have gone over carefully)." He opined that Applicant was not psychiatrically disabled although she did have a normal anxiety about her disability and financial problems.

16/ Dr. Roback's letterhead reflected that his specialty was orthopedic surgery.
17/ Dr. Koefler's letterhead reflected that his specialty was adult and child psychology.

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Exhibit 41 January 16, 1973 report of Dr. Koefler

Dr. Koefler reported that he saw Applicant about once a week from December 7, 1972 to January 16, 1973. Applicant reported that she had pain in the anterior chest which she felt was related to a chest and/or heart injury and pain in the low back radiating down the legs which she felt was caused by her back being injured.

Dr. Koefler opined that Applicant did not seem significantly depressed although she reported periods of depression; anxiety was manifest by her talkitiveness and by occasional difficulty sleeping. Dr. Koefler opined that "there are emotional factors which probably have made her more disabled than her injuries would have caused on a physical basis". Dr. Koefler wrote that "(a)ny significant psychiatric sequellae of the injuries have resulted in physical symptoms and if a settlement is reached regarding these, there is no need further to consider psychiatric sequellae as separate entities".

Exhibit 42 Undated report of Elmer C. Rigby, M.D. 18/

Dr. Rigby reported that Applicant came to his office on January 4, 1971 and requested that a report be sent to the State Compensation Insurance Fund. Applicant reported that recently, her pain extended more broadly over the left chest area and then radiated into the shoulder and occasionally into the mid forearm.

18/ A date stamp reflected a date of January 25, 1971.

Examination revealed tenderness over the left 2nd, 3rd, 4th and 5th rib cartilages, with the 5th rib cartilage being the most tender; when that area was palpated from the lateral aspect through some of the breast tissue, it was Less tender then when palpated directly. Dr. Rigby wrote that breast tissue should not alter rib tenderness to the extent that it apparently did.

Dr. Rigby's diagnosis remained "chronic perichondritis" and he noted that the facts that the pain came on spontaneously without arm movements and that the pain radiated into the forearm suggested an anxiety component. He recommended nothing further in the way of management.

Exhibit 43 February 15, 1971 report of Eric T. Yuhl, M.D.

Dr. Yuhl reported that he examined Applicant at the request of Dr. Watanabe. Applicant reported intermittent pain across the low back and down the right thigh. On February 12, Applicant experienced severe low back pain

and pain down the left lower extremity when she attempted to get up from a chair; since then her left leg intermittently gave way and she had severe low back pain. Applicant reported considerable back pain with any activity but only negligible pain when at rest.

Neurologic examination was essentially normal. Bilateral paravertebral muscle spasm were noted and back motions were extremely painful and restricted. Left lateral bending caused severe pain across the low back.

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Dr. Yuhl opined that Applicant had a recurrent lumbosacral strain.

Exhibit 44 19/ April 4, 1973 report of Bernard Sosner, M.D.

This exhibit was previously received as Applicant Exhibit 27(d).

Exhibit 45 February 27, 1970 report of P. Konrad, M.D. and G. Smith, M.D.

The diagnosis of a bone marrow aspirate and biopsy reflected a relative increase in the erythroid series.

Exhibit 46 Statements of James H. Kittredge

In a series of one page statements in July to November, 1970, Dr. Kittredge reported Applicant's condition. In July, 1970,
Dr. Kittredge wrote that Applicant had a "blood disorder of unknown origins accompanied by disabling physical symptoms". The symptoms

19/ At the January 7, 1988 hearing, Applicant was told that if she intended to introduce any evidence at the scheduled January 15, 1988 hearing in addition to the 43 exhibits that were introduced at the January 7, 1988 hearing, then she would have to send those exhibits to County Counsel before the January 15, 1988 hearing. With a cover letter dated January 7, 1988, Applicant sent a package of documents to County Counsel and myself. Since the January 15, 1988 hearing was canceled and no additional days of hearing were held, in a letter subsequently sent, I gave County Counsel an opportunity to object to any of these documents; no objections were received. These exhibits are Applicant Exhibits 44-52 and are hereby received into evidence.

(33)

first appeared in May, 1970, and Applicant first consulted with him on June 28, 1970. He noted that Applicant had been disabled since May, 1970. He advised her to seek assistance in the diagnosis and treatment of her blood disorder. In November, 1970, Dr. Kittredge wrote that Applicant suffered from "Hemopoietic Dyscrasia, accompanied by Asthenia, Abdominalgia, Diarrhea, Fever" and he again noted that she had been disabled since May, 1970.

Exhibit 47 March 31, 1973 report to Ronald R. KoeglerMD

Dr. Koefler's report was previously received as Applicant Exhibit 40.

Exhibit 48 Unsigned and undated Insurance Form

In a document prepared by Applicant, she reported her February 14, 1969 elevator accident. She wrote that she developed a fever of unknown origin in August, 1969 and that by January, 1970, she was very ill. She reported that since January 2, 1970, she spent most of the time in bed and otherwise limited her physical activities.

Exhibit 49 Department of Community Development letters to Applicant

(34)

May 25, 1976

Applicant was notified that the Department intended to separate her from her position as Senior Community Improvement Analyst and County service effective on June 10, 1976 because of her physical inability to perform her duties. The letter noted that the Department of Personnel, Claims and Rehabilitation Division had imposed the following restrictions:

1. No freeway driving or automobile riding as a passenger.

2. Preclude from emotional stress or tension, i.e., anger, anxiety, confrontations, meeting dead lines, conflicts with authority.

The letter also noted that Applicant suffered from Lupus as confirmed by Occupational Health Services on May 5, 1976.

June 9, 1976

Applicant was notified of her separation from her former

position and County service effective June 10, 1976 because of her physical inability to perform her duties. 20/

20/ In the letter, it was noted that Applicant was off work from May 14 to July 6, 1968, then intermittently off work through September 12, 1969 and then off work continuously thereafter.

(35)

June 30, 1976

The June 9, 1976 letter was amended to properly notify Applicant of her rights of appeal.

Exhibit 50 Letters to Applicant from Department of Personnel 21/ October 23, 1973

William A. McClure, Chief of the Claims and Rehabilitation Division, wrote that Applicant's medical diagnosis was "post-traumatic anxiety". The following restrictions were imposed:

1. No freeway driving or automobile riding as a passenger.

2. Preclude from emotional stress or tension, i.e., anger, anxiety, confrontations, meeting dead lines, conflicts with authority.

May 5, 1976

R. M. Schwartz, M.P.H., Director of Medical Services of Occupational Health Services, wrote the following to the Department of Community Development Personnel Officer:

We have verified the fact that (Applicant) is suffering from the disease from which she alleges to suffer.

21/ Two letters concerning the cancellation of Applicant's insurance were included.

(36)

Exhibit 51 Various letters to or from Applicant

These letters were not relevant to the underlying issues in this matter.

Exhibit 52 Reports of Robert S. Watanabe, M.D.

May 7, 1971

On April 30, 1971, Applicant complained of severe pain in the lumbar area; examination revealed a 2-plus spasm and radiating pain to the right calf. He gave her an injection of Xylocaine in the right lumbar spine region.

May 11, 1971

On May 10, 1971, Applicant still had pain and spasm in the lumbar spine but she reported some improvement. She received a Kenalog injection. Dr. Watanabe extended her disability for a month.

May 19, 1971

On May 17, 1971, Applicant reported that her back "went out" and that she had severe pain. He gave her injections in the L5-S1 area and extended her disability until June 1, 1971.

(37)

June 11, 1971

On June 2, 1971, Applicant had difficulty sitting and standing and had right leg sciatica. Dr. Watanabe gave Applicant another injection and extended her disability until July 2, 1971.

June 25, 1971

On June 23, 1971, Applicant still had severe pain and discomfort in the lumbar region; he gave Applicant an injection of hydrocortisone and extended her disability until July 23, 1971.

July 27, 1971

On July 23, 1971, Applicant's condition continued. Dr. Watanabe recommended another evaluation by Dr. Yuhl.

August 13, 1971

Dr. Watanabe wrote that August 9, 1971 x-rays revealed a "partial lumbarization of the L5 vertebrae" and "a list of the spine to the right and narrowing of the joint line L5-S1".

August 26, 1971

On August 25, 1971, Applicant complained of recurrent severe thoracic pain after she had sneezed a few days earlier; she

also complained of persistent right leg sciatica. There was severe tenderness across the sterno-costal chondral

margin of the right 5th rib area and lumbar spasm and tenderness. Dr. Watanabe extended Applicant's disability an additional three weeks.

November 12, 1971

On October 27, 1971, Applicant complained of pain in the right knee, lumbar spine and mid-sternal area. Dr. Watanabe extended Applicant's disability another month.

November 19, 1971

Dr. Watanabe again reported Applicant's October 27, 1971 office visit.

December 13, 1971

On December 8, 1971, Applicant complained of bilateral side pain with sitting, leaning, bending or left leg raising and radiating pain on the left into her foot. There was 2-plus lumbar spine spasm.

(39)

February 4, 1972

On January 26, 1972, Applicant complained of spasm and pain in the lumbar spine and a decreased range of motion. Dr. Watanabe recommended home traction because Applicant's condition was not sufficiently improving.

Exhibit 53 September 19, 1969 Pamphlet of Operation Break- through 22/

Exhibit 54 Applicant's application

Applicant wrote that her disability resulted from the "industrial injury of May 14, 1968 and February 14, 1969 as described in the Department of Personnel Workmen's Compensation records". She checked the box indicating that she believed that her disability was service connected.

In the next section of the form, the Department Head noted that Applicant had 2 and 4/12 years of service.

In another section, the. Retirement System Manager noted that Applicant had been a member of the Retirement Association since January 1, 1968.

22/ This document was enclosed with Applicant's February 16, 1988 letter.

Exhibit 55 Disability Evaluation Under Social Security - a handbook for physicians

This document was attached to Applicant's April 14, 1988 closing brief; it was not previously offered.

Exhibits Offered By The Board 23/

March 26, 1974 report of Charles N. Moss, M.D., P.HD., Medical Consultant to the Retirement Board

Dr. Moss summarized the medical records that he reviewed of numerous physicians including internists, cardiologists, orthopedists, neurosurgeons, chest surgeons and psychiatrists. 24/

Dr. Moss concluded that there was little objective evidence to support a physical disability. He opined that "(h)er main problem appears to be her anxiety about working under pressure on her job". He noted that she returned to work after her recovery from the actual physical injuries and then "because of the pressures of her job, she began to somatize her anxieties" and began to complain of bizarre pains. He recommended against a service-connected disability retirement.

23/ This document was submitted at the June 11, 1986 hearing.

24/ Not all of these reports were submitted as exhibits herein.

DISCUSSION

With regard to Applicant's orthopedic and cardiac conditions, Applicant failed to establish that they resulted in her permanent incapacity for the performance of her duties. Although she missed some time from work following the May, 1968 injury, she was able to subsequently return to work and perform her duties. Similarly, Applicant was able to work until September, 1969 following her February, 1969 injury. Furthermore, the medical records do not support Applicant's claim that she was permanently incapacitated for the performance of her work because of either condition since no reporting physician offered such a conclusion. While Dr. Roback opined that Applicant was limited to light duties, he did not preclude her from continuing to perform her former duties and the evidence failed to establish that Applicant's job constituted anything but light duties. Accordingly, Applicant failed to establish that any orthopedic or cardiac condition rendered her permanently incapacitated for the performance of her duties.

With regard to her Lupus condition, the evidence established that this condition was not part of her original application, was not presented to and was not considered by the Board at the time Applicant's application was previously considered in 1974. Rather, it appears from this record that Applicant's claim was based upon the orthopedic and cardiac injuries sustained in the May 14, 1968 and February 14, 1969 accidents. However, the record, when taken as a whole, established that at the present

time Lupus has rendered Applicant permanently incapacitated for the performance of her duties. The reports of Dr. Gross and Dr. Shapiro established a diagnosis of Lupus and there was no medical evidence to the contrary. Applicant was separated from her employment with the County in June, 1976 because she was medically not able to perform her duties and there was no evidence to establish that her condition has improved. In fact, the record established that Applicant's condition has in fact deteriorated. Accordingly, Applicant met her burden of proving that she is now permanently incapacitated for the performance of her duties.

While Applicant alleged that her Lupus condition was the result of her two accidents and/or industrial stress, she offered no medical evidence to support her claim. Applicant's theory was based upon the fact that her Lupus symptoms manifested only after these injuries. However, there was absolutely no evidence, other than Applicant's speculation and conjecture, that either the 1968 automobile or the 1969 elevator injury caused her condition or that the chronology was anything other than pure coincidence. With regard to the issue of stress, Dr. Shapiro and Dr. Gross wrote that stress could aggravate Lupus. However, Dr. Gross merely concluded in 1987 that Lupus could be aggravated by stress; Dr. Shapiro wrote about 1987 stress on her current condition and addressed himself to a current possible eviction action against Applicant. Neither physician analyzed Applicant's case and opined that Applicant's alleged industrial stress directly caused the initial onset or aggravated Applicant's Lupus condition to the point that the disease permanently incapacitated her when she stopped working

in 1969. In fact, in April, 1971, she told Dr. Tuchman that she stopped working because of her back and rib injuries. Therefore, assuming arguendo that Applicant experienced industrial stress, the evidence does not warrant the conclusion that her Lupus condition was service-connected.

With regard to the alleged industrial stress experienced by Applicant, the record revealed contradictory evidence. While applicant alleged that one of the sources of stress was the amount of overtime that she worked, Dr. Dimitroff's February 20, 1969 report reflected that Applicant told him that she did not work any overtime on the weekend and worked very little overtime at other times. Because Dr. Dimitroff's report was relatively contemporaneous to the events, it should be deemed to be the most accurate. In addition, the various statements of the alleged stress given to the various physicians and at the hearing were not consistent. Further, it must also be noted that Dr. Dimitroff commented that none of the stresses cited to him by Applicant were current at the time of his February, 1969, examination. For all the above reasons, Applicant's accuracy as a historian is suspect.

Accordingly, Applicant failed to establish that there was a real and measurable connection between alleged work stress and her Lupus condition as required by Bowen v. Board of Retirement (1986) 42 Cal. 3d 572.

FINDINGS OF FACT

1. Applicant was employed by the County for a period of two years and four months.

2. Applicant is permanently incapacitated for the performance of her duties as a Senior Community Improvement Analyst.

3. Applicant's incapacity for the performance of her duty did not arise out of nor was it in the course of her employment with the County.

CONCLUSIONS OF LAW

1. Applicant is not entitled to a service connected disability retirement.

2. Applicant is not entitled to a non service-connected disability retirement because she did not have five years of service as required by Government Code Section 31720.

RECOMMENDATIONS

1. Since Applicant is not entitled to a service-connected disability retirement, I recommend that it be denied.

2. Since Applicant is not entitled to a non service-connected disability retirement, I recommend that it be denied.

DATED: June 3 , 1988

Respectfully submitted,

MARK BURSTEIN
Referee

LOS ANGLES COUNTY EMPLOYEES'
RETIREMENT ASSOCIATION
BOARD OF RETIREMENT
July 15, 1988

Dear Ms. Waldron-Shah

The Summary of Evidence, suggested Findings of Fact and Suggested Conclusions of Law of Referee Mark Burstein in the matter of the above disability retirement hearing were presented to the Board of Retirement at its meeting of July 6, 1988.

The Board, adopted the findings of Referee Burstein and found you to be disabled for nonservice-connected causes. However, you do not have the necessary service to receive a nonservice-connected disability retirement.

If you wish to file a petition with the Superior Court for a Writ of Mandate appealing the decision, you must do so within 90 days from the date of notification. The time period for this judicial review is governed by Section 1094.6 of the Code of Civil Procedure as adopted by the Board of Retirement on June 3, 1981.

If you have any questions or need additional information, please contact the Retirement Services Division at (213) 687-8040, extension 207, or you may reach us by calling 1-800-366-3875.

Very truly yours
C.L. SPENCER
Retirement Administrator
CLS:gw Enclosure. cc: Urban Affairs, Mark Burstein, Wayne R. Parrish, File (2)

LOS ANGELES COUNTY EMPLOYEES RETIREMENT ASSOCIATION

March 2, 1981

Dr. Diane Lynn Waldron-Shah
133 Woodstock Road
Oxford, England

Dear Dr. Waldron-Shaw:

I received a copy of a letter to you from Mr. William McClure, Chief, Workman's Compensation Claims concerning a possible appeal of your denial of disability retirement.

This letter will confirm that we have no record of any appeal of the Board's decision to deny you a disability retirement.

Very truly yours,

H. B. ALVORD, ADMINISTRATOR

Jerry Hampton, Chief
Retirement Benefits Division

JH:ec

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
COUNTY OF LOS ANGELES
DEPARTMENT OF COMMUNITY DEVELOPMENT

May 25, 1976

Ms. Diane Lynn Waldron-Shah
617 Ocean Avenue
Santa Monica, California 90002

Dear Ms. Waldron-Shah:

This letter is to inform you of our intent to separate you from your permanent position of Senior Community Improvement Analyst and from County service, effective on or before June 10, 1976, because of your inability to physically perform the duties of your classification.

This proposed separation is based upon your physical inability to perform the job without the following restrictions as established by the Department of Personnel, Claims and Rehabilitation Division:

1. No freeway driving or automobile riding as a passenger.

2. Preclude from emotional stress or tension, i.e., anger, anxiety, confrontations, meeting deadlines, conflicts with authority.

Also, it is based upon your medical condition called Systemic Lupus Erythematosus (SLE) that you are presently suffering from. This medical condition was confirmed by Occupational Health Services, Department of Personnel, on May 5, 1976, which limits your physical ability to work only a few hours per day on days when you are physically able.

Our review of your work standards have indicated that they are not compatible with these work restrictions. Due to the nature and severity of your medical condition and work restrictions, we have not been able to place you in any other job assignment.

For these reasons of your chronic medical disabilities as they relate to the requirements of your job, we have no alternative but to medically release you from County service. Said release to be without prejudice as to re-employment should your condition improve, subject to the applicable provisions of the Charter and Rules.

All written materials and documents upon which this action is based are available for your review. The written materials and documents upon which this action is based are attached.

You have the right to respond, either orally, in writing or both. If you choose to respond in writing, send your response to the facts contained in this letter to Ms. Alice Kato, Department of Community Development, by Friday, June 3, 1976. If you wish to respond orally to these charges, you may meet with Ms. Alice Kato before June 3, 1976. For an appointment, call her office at 385-1265.

If you have not contacted Ms. Kato either orally or in writing by June 3, 1976, you will have waived your right to respond.

Very truly yours,

HARRY L. HUFFORD, Acting Director

ROY D. HOOVER, Manager Urban Development Division

COUNTY OF LOS ANGELES
EMPLOYEES RETIREMENT ASSOCIATION
BOARD OF RETIREMENT
437 HALL OF ADMINISTRATION
LOS ANGELES, CALIFORNIA 90402

April 4, 1974

Diane Lynn Waldron Shah
617 Ocean Avenue
Santa Monica, CA
90402

Your application for retirement because of service connected disability was presented to the Board of Retirement at its meeting on April 3, 1974, and an order was made, finding that you were not disabled and denying your request for a service-connected disability retirement allowance.

BOARD OF RETIREMENT
"B. J. Neurenburg"
Acting Chairman

BJN:A
cc Urban Affairs Retirement Division

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION
APPLICATION FOR DISABILITY RETIREMENT

(8)

Board of Retirement
500 West Temple Street
Los Angeles, California 90012
Gentlemen:

I have become permanently incapacitated from the performance of my duties in the position of Sr.Community Improvement Analyst Department of Urban Affairs.and therefore request that I be retired for disability to be effective on the day this application is filed or on the date following the last day for which I received regular compensation, whichever is later.

The nature, onset, duration, and course of the disease or injury causing such disability are industrial injury of May 14,1968 and February 14, 1969,as described in the Department of Personnel Workmen's Compensation records

Any statements or supporting data which I may have are attached.

It is my belief that the origins of the disability is service connected /x/ non service connected / /.

I request that you make such investigation as is deemed necessary to establish the facts pertinent to my disability. My personal physician, your medical examiner, and all other persons having knowledge threof are hereby authorized to disclose them to you or your agents for the purpose of establishing the kind and degree of my disability.

I further request that the amount of my retirement allowance be computed on the Unmodified Basis. I

understand that I may change the basis for my retirement allowance to one of the four optional bases at any time prior to the date of my first retirement warrant
Very truly yours,
Signature- Diane Lynn Waldron-Shah
Address- 617 Ocean Avenue Santa Monica, Calif 90402

Service: 2-4/12 SCD 639.50
NSCD Not Eligible SWOP 3-7/12
Acknowledged by Roy D. Hoover Dept.Head

CERTIFICATION BY RETIREMENT DIVISION
The records of this office indicate Diane Lynn Waldron-Shah was born on 10/22/36 (37) and has been a member of the Los Angeles County Employees Retirement Association since 1/1/68

HAROLD J. OSTLY County Treasurer
By E.J. Martin, Retirement Systems Manager
Dated 1/23/74

DEPARTMENT OF URBAN AFFAIRS

November 21, 1973

Dear Miss Waldron-Shah:

It has come to our attention that the Workmen's Compensation Appeals Board settled your industrial injury claim with the issuance of an Order Approving Compromise and Release dated June 15, 1973 in the amount of $17,500.

In accordance with normal County policy, we have a statement from the Workman's Compensation and Occupational Health Section of the Department of Personnel indicating various work restrictions which would be placed upon you should you desire to return to County employment. In reviewing these restrictions, we find that you will be unable to function in your position as a Senior Community Improvement Analyst since you will be unable to either drive or ride in a car. We also find that we cannot assign you any work which would create emotional stress, tension, anxiety, or conflicts with authority.

In view of the above, it has been recommended by the Claims and Rehabilitation Division of the Department of Personnel that you file a disability retirement application as provided by Section 31721 of the County Employees Retirement Law of 1937. If you do not wish to file such an application, you can contact me and I will file one on your behalf, if you so desire.

I regret my inability to offer more positive assistance to you at this time and should you have any questions concerning the above, please do not hesitate to contact me at 974-1635.

Sincerely,

WILLIAM EMMETT, DirectorAdministrative Services
WE:gc

STATE OF CALIFORNIA
WORKMAN'S COMPENSATION APPEALS BOARD

COMPROMISE AND RELEASE

Doctor DIANE. L. WALDRON-SHAH
617 Ocean Avenue, Santa Monica, CA 90402
vs.
COUNTY OF LOS ANGELES
STATE COMPENSATION INSURANCE FUND

The parties hereto, for the purpose of compromise only, hereby submit the following agreed statements of fact:

1. Diane L. Waldron-Shah, employee born on October 22, 1936 claims that he was employed on the
   1) 14th day of May 1968,
   2) 14th day of February 1969
at Los Angeles, California as a Research Scientist by County of Los Angeles then insured as to Work .an's Compensation liability by State Compensation Insurance Fund and that he sustained an injury arising out and in the course of his employment as follows:
   1) Back, chest, heart, and head;
   2) back, chest, heart.

2. The actual wages of the employee at the time of injury were $ maximum.
3. The employee's present disability is in dispute and the employee has not returned to work since September 1969.
4. (a) Temporary disability indemnity has been paid to the employee in the sum of $14,656. 72 at $ various rates per week beginning 5/15/68 and various periods to an including 1/16/73. The amount due and unpaid to the employee is $ in dispute.

(b) Permanent disability indemnity has been paid to the employee in the sum of $925. covering period 1/24/73-5/17/73. Additional advances are being paid on a regular basis.

5. The parties hereby agree to settle any and all claims on account of said injury by the payment of the sum of $17,500. in addition to any sums heretofore paid by the employer or the insurer to the employee, said sum to be payable as follows:

In one lump sum to applicant, less

1) Lien claims of Doctors, Allenstein, Tuchman, Robach and Sosner;
2) Attorney fees;
3) All other valid liens of record;
4) All permanent disability advances made after January 24, 1973.

6.Medical and hospital expenses have been paid $ none by employee and $ all by employer or carrier. Unpaid bills amount to $ none. Future medical and hospital expense is estimated at $ in dispute.

Unpaid and future medical and hospital expenses is to be assumed as follows: Entirely by applicant.

Rule 14.1.k.iii
Orders on Rehearing and Review

Second Appellate District Division Three,
No. B050005 S0 21968
IN THE SUPREME COURT OF THE STATE OF CALIFORNIA
IN BANK

DIANE L. WALDRON-SHAH, Appellant
v.
BD. OF RETIRMENT L.A. COUNTY EMPLOYEES' RETIREMENT Et Al., Respondents

Appellant's petition for review DENIED.

LUCAS
Chief Justice

FILED: AUGUST 21, 1991

OFFICE OF THE CLERK COURT OF APPEAL
STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
ROBERT N. WILSON, CLERK
DIVISION: 3 DATE: 07/03/91

Diane L. Waldron-Shah
617 Ocean Ave.
Santa Monica, CA. 90402

RE: Waldron-Shah, Diane L.
vs .
Board of Retirement of the County of La
2 Civil B050005
Los Angeles NO. C700717

THE COURT:
Petition for rehearing denied.

SUPREME COURT OF THE UNITED STATES

No. A-253

Diane Waldron-Shah,
Petitioner

v.

Board of Retirement of Los Angeles County
Employees' Retirement Association

ORDER

UPON CONSIDERATION of the application of the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to and including December 19th, 1991.

/s/ Sandra Day O'Connor

Associate Justice of the Supreme
Court of the United States

Dated this 11th day of October, 1991.

Rule 14.1.k.iv

Remittitur to Superior Court

COURT OF APPEAL OF THE STATE OF CALIFORNIA
FOR THE SECOND APPELLATE DISTRICT
DIVISION: 3

Lemaire & Faunce
Mark Ellis Singer
3020 Old Ranch Parkway
Suite 290
Seal Beach, CA, 90740 2751

RE: Waldron-Shah, Diane L.
vs.
The Board of Retirement of the
County of Los Angeles
2 Civil BO50005
Los Angeles NO. C700717

* * REMITTITUR NOTICE * *

Notice is hereby given that the Remittitur has been issued this date and that the opinion, decision or order entered in the above entitled cause on 6/03/91 is now final.

*** * Affirmed in Full * ***

Respondent to Bear Costs.

ROBERT N. WILSON, Clerk
By: M. Gavinski
Deputy Clerk

September 17, 1991

3

91 1027

No._____

Supreme Court, U.S.
FILED
DEC 27 1991
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

DIANE L. WALDRON–SHAH
Petitioner,

versus

THE BOARD OF RETIREMENT OF THE
LOS ANGELES COUNTY
EMPLOYEES' RETIREMENT ASSOCIATION
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT

PETITION FOR A WRIT OF CERTIORARI
APPENDIX II
DOCUMENTS & TRANSCRIPT EXCERPTS

DIANE L. WALDRON
617 Ocean Avenue
Santa Monica
California, 90402
(310) 394-3506
In Pro Se

Rule 14.1.k.v
Appended Materials

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Before:
THE BOARD OF RETIREMENT
COUNTY OF LOS ANGELES
Reporter's Transcript of Proceedings

Wednesday, June 11th, 1986
(transcript dated April. 7th, 1987)
Michele McCoy, Court Reporter CSR No 3826

Before: Donald H. Black, Referee

County Counsel Wayne Parrish, for the Respondent

EXCERPTED TOPIC FROM THE BLACK HEARING

Referee conceals and lies about the application and keeps the claimant's statements and documents out of the record.

(Emphasis added)

* * * * * (Original transcript page 6.)

REFEREE BLACK: What is the basis of your claim?

WALDRON: The basis of my claim is two-fold, but --

REFEREE BLACK: **Let me stop you for a minute. Do you have a copy of the application that you made for disability retirement?**

WALDRON: **No, I don't.**

REFEREE BLACK: I am not sure that I do.

C.C.PARRISH: I do not.

WALDRON: May I read my initial statement, please.

REFEREE BLACK: No. First of all --

WALDRON: It is not long.

REFEREE BLACK: Let us have an understanding right up front. This is my hearing. I will control it.

WALDRON: Yes, sir.

REFEREE BLACK: **Now, you make a claim based on an application. That application forms the basis of your appeal.**

* * * * * (Original transcript page 7.)

REFEREE BLACK: This is evidently -- **this is the application.** It is such an old one. I wasn't familiar with it. **It is a one-page document**. It apparently was **provided to my file by the Retirement Board.**...Your application for disability retirement ... **talks about pressures.**

* * * * * (Original transcript page 8.)

REFEREE BLACK: *** The nature and onset and course of the disease or the industrial injuries of May 14, 1968 and February 14, 1969 as described in the Department of Personnel Workmens' Compensation record. **What are those injuries?**

* * * * * (Original transcript page 11.)

REFEREE BLACK: **It is your position here that the lupus is caused by the auto accident.**

* * * * * (Original transcript page 11.)

REFEREE BLACK: **You didn't make a claim based on overwork and stress. I am going to deny any attempt on your part to put in any evidence.** That question has not been presented to the Board.

WALDRON: **It was in the medical records.**

* * * * * (Original transcript page 15.)

C.C. PARRISH: *** **It appears from the state of the file that a great number of the records have been destroyed.**

* * * * * (Original transcript page 22.)

REFEREE BLACK: You don't have to have a doctor come, but he is to write a report that he has examined you, that you have lupus, that you related a history that in his opinion as a specialist, there is a causation connection between your lupus and the auto accident in '68 ***

* * * * * (Original transcript page 25.)

WALDRON: *** Is there anything that you find is not clear in the materials that I have submitted?

REFEREE BLACK: **First of all, I am not going to go take this document because it has got a lot of self-serving things** ***

* * * * * (Original transcript page 27.)

REFEREE BLACK: **I have removed from this booklet that you gave me what appears to be the basis of your claim.** *** Just a moment. I am removing page 4, page 5, page 6 because they relate to stress.

Just a moment. *** no -- I am going to change what I said. *** no where in the Moss report do I find any mention -- unless you want to correct me -- of lupus --

WALDRON: Dr. Moss didn't care to put it in because he worked for the County ***

* * * * * (Original transcript page 31.)

REFEREE BLACK: *** <u>I am dealing with an application that I have which is part of the record and is the only</u>

thing that was considered which was your back injury ****

* * * * (Original transcript page 32.)

REFEREE BLACK: *** **I will consider only those portions which I consider relevant to the issues as I could find them. Any mention of work stress and the systemic lupus will not be considered.**

* * * * * (Original transcript page 32.)

There will be parts of others that will also be excluded. Basically this would be the testimony that you would be giving here today.

WALDRON: Yes. **I would have intended to have read those pages into the record.** This was my hope to read them into the record.

* * * * * (Original transcript page 35.)

REFEREE BLACK:**Wait,wait. What is the Respondent's position on the application for Worker'sCompensation?**

C.C. PARRISH: Object, not relevant.

REFEREE BLACK: **Sustained.**

* * * * * (Original transcript page 35.)

REFEREE BLACK: **All documents submitted relating to the Worker's Compensation claim are not admitted** ***

* * * * * (Original transcript page 35.)

(Discussion off the record.)

(Proceedings concluded at 11:30 A.M.)

.....

Exhibits as offered by referee. (*none*)

No formal examination had.

Note to Black Transcript: Referee Black refused to let Dr. Waldron to look at the original application. The application, which was finally revealed by Referee Burstein long after the second hearing says on it in very bold type **"Any statements or supporting data which I may have are attached."** *and there are staple marks in the upper left corner of the application where these were attached. This document was provided by Referee Burstein from LACERA's files as Exhibit Number 2-54, to be found in the Joint Transcript on page 330. A typeset version of it is provided below*

LOS ANGELES COUNTY EMPLOYEES ASSOCIATION
APPLICATION FOR DISABILITY RETIREMENT

(8)

I have become permanently incapacitated from the performance of my duties in the position of Sr.Community Improvement Analyst Department of Urban Affairs.and therefore request that I be retired for disability to be effective on the day this application is filed or on the date following the last day for which I received regular compensation, whichever is later.

The nature, onset, duration, and course of the disease or injury causing such disability are

industrial injury of May 14,1968 and February 14, 1969,as described in the Department of Personnel Workmen's Compensation records

Any statements or supporting data which I may have are attached.

It is my belief that the origins of the disability is service connected /x/ non service connected / /. * * *

Before:
THE BOARD OF RETIREMENT
COUNTY OF LOS ANGELES

Reporter's Transcript of Proceedings
Thursday, January 7th, 1988
(transcript dated Dec. 15th, 1988)
Michele McCoy, Court Reporter CSR No 3826

Before: Mark Burstein, Referee

County Counsel Wayne Parrish, for the Respondent

EXCERPTED TOPICS FROM THE BURSTEIN HEARING

p. 7- ***#1 Referees conceal Disability Application form***

p. 11- ***#2 County Counsel Refers to Attachments on the Application***

p. 12- ***#3 Applicant Deprived of Access to Transcripts***

p. 13- ***#4 Referee Refuses to take Evidence of LACERA's Wrong-Doing***

p. 15- ***#5 County Counsel Does Not Enter Dr. Moss's Report into Evidence***

p. 16- ***#6 LACERA Takes Advantage of Applicants's Disabilities with Deliberate Delays and Refuses to let her make her Statement***

Emphasis added.

#1 Referees conceal Disability Application form

* * * * * (Original transcript page 4.)

REFEREE BURSTEIN: **I have reviewed the transcript from the prior hearing** and I have some confusion in my mind about exhibits, whether they are in and what exhibits are not in. **I think it would make some sense if we start off from the beginning in terms of introduction of the exhibits.**

WALDRON: **I must object to this in part because I submitted, as you will remember a great box of exhibits,** and those exhibits are -- I have not reduplicated those or anything. I think about 18 inches of exhibits.

REFEREE BURSTEIN: **I don't have those.**

WALDRON: Mr. Black had them.

* * * * * (Original transcript page 16.)

WALDRON: **The medical data necessary went out of this room in Mr. Parrish's hands two years ago.** ***

* * * * * (Original transcript page 17.)

REFEREE BURSTEIN: All right. **What I would like to do at this point is have Dr. Shah assemble, if she has not already done so, all the documents that she wishes to put into evidence today.**

* * * * * (Original transcript page 17.)

WALDRON: *** **These documents assume that the previous documents have not been destroyed** ***

* * * * * (Original transcript page 18.)

REFEREE BURSTEIN: What you submitted to the Board, what you submitted to Mr. Black what you

submitted to Mr. Parrish, **what you submitted to anyone else prior to this hearing, this moment, prior to today, will not be considered.** Whatever you want to have considered must be submitted now or subsequent to this year. (*sic - properly 'hearing' DLW*).

* * * * * (Original transcript page 19.)

WALDRON: *** I have a letter here from Mr. Black which said to me simply that I am to come here today, and he very clearly states in this letter that I am to come here today with only my personal statement and a current medical statement..***

REFEREE BURSTEIN: We are going to continue this case so that you have the opportunity to submit whatever you want ***

WALDRON: **I am not going to live long enough for any continuances. The last continuance took two years.**

* * * * * (Original transcript page 22.)

WALDRON: *** I want to know what happened to all my files, where have they disappeared to? Third, I would like to know why the person who had all the files was taken off the case at the last minute. He was taken off just before -- whether a month or something the person with all the files disappeared with the files. He was replaced by somebody who has nothing. **The third time these files have disappeared.**

* * * * * (Original transcript page 23.)

REFEREE BURSTEIN...**Since you have no documents, you don't have them today**, and based upon the letter from Mr. Black which limited what this hearing was going to be about today, **I am going to give you the opportunity to bring in those additional documents.**

WALDRON: I **will stay with what I have got for the time being.**

REFEREE BURSTEIN: **You understand that that is your choice.**

* * * * * (Original transcript page 58.)

REFEREE BURSTEIN: Stop. *** **There are lots of allegations that you have made this morning about your having brought documents that were given to the other parties and to the hearing officer and to the board. The fact remains that they are not present** and you can make allegations that Mr. Black disappeared with them, that Mr. Parrish disappeared with them, that Ms. McCoy disappeared or even I disappeared, even though I wasn't there ***

* * * * * (Original transcript page 62.)

REFEREE BURSTEIN: **When this case was reassigned to me, there was a package of information that was included in that package I received. I am going through that. I note that there are reports and other documents in that package that I received that I had not entered into evidence.*****

* * * * * (Original transcript page 63.)

REFEREE BURSTEIN: **Hold on. Maybe you didn't understand what I said. Those documents were sent to me and are not in evidence. I am giving those to you so that you can go through those documents and enter into evidence anything that you wish. You don't need to make a speech. Just select what you wish to submit.**

WALDRON: Where is the Leopold Tuchman letter? You won't admit a partial. Where is the full one?

REFEREE BURSTEIN: **Pull out from that package what you wish to submit, okay?**

(Discussion held off the record.)

* * * * * (Original transcript page 63.)

REFEREE BURSTEIN: Have you segregated the file into what you want to put in and what you don't?

WALDRON: Yes.

REFEREE BURSTEIN: **May I have the remainder of what you do not wish to submit.**

WALDRON: **Some of these things have already been put in.**

REFEREE BURSTEIN: **That may or may not be. Let me have that package.**

* * * * * (Original transcript page 70.)

C.C. PARRISH: If I might comment for clarity of the record, Exhibit 39 which has pages missing would be dated properly May 11, 1973.

REFEREE BURSTEIN: **How do you know that?**

C.C. PARRISH: **I have a complete copy of it.*****

***** **that I have had for some time.**

* * * * * (Original transcript page 71.)

WALDRON: **May I suggest that all of these materials were from a package which County Counsel was given at the same time Mr. Black was given it. *****

C.C. PARRISH: **In all candor, the only one that I would request a copy of is Dr. Roback's report which I have**

just given to you which is 39, 40, and 41.

* * * * * (Original transcript page 79.)

REFEREE BURSTEIN: -- **and you had the burden of providing all this evidence 60 days ago.**

WALDRON: **The evidence was sent in** with the exception of one letter which was sent November 12.

REFEREE BURSTEIN: **There are reams of evidence that were sent and reams of paper,** ***

#2 County Counsel Refers to Attachments on the Application

* * * * * (Original transcript page 14.)

REFEREE BURSTEIN: *** As I understand, there are some questions or there was some issue at a prior hearing as to what the exact nature of the claim was. That came from the original transcript, the **original application**, rather, which, as I understand it, is quite old. **I am not even sure if there is a record of it anywhere** ***

* * * * * (Original transcript page 14.)

C.C. PARRISH: *** I do have documentation with respect to the orthopedic and internal and psychiatric, as I understand it. **So that I am certain it is still an issue because it has been covered in the application.**

#3 Applicant Deprived of Access to Transcripts

* * * * * (Original transcript page 13.)

REFEREE BURSTEIN: **In order for you to get a copy of the transcript, it has to be done in writing and certain procedures and requirements have to be followed.**

WALDRON: **Are those procedures and requirements outlined in the yellow booklet that was provided to me only seven days ago?**

REFEREE BURSTEIN: I don't know.

WALDRON: I didn't see them anywhere.

REFEREE BURSTEIN: I don't know where they are set forth. If you didn't see them --

WALDRON: Because **I have requested at great length in writing to the Board that I be given the details of the procedures necessary to obtain these documents. I was told these details were unavailable to the public and unavailable to any lawyer and all that was available to either was the yellow booklet, and nothing is set forth in the yellow booklet.**

REFEREE BURSTEIN: Are you asking now that I do something? What is the purpose of the statement?

WALDRON: I am entering this as an objection to the way the case has been handled and as a further example of the improper handling on the County's part.

REFEREE BURSTEIN: Your objection is obviously noted on the record. **I will say to you, if you want a copy of the transcript, you contact the necessary people at the Board of Retirement and find out the appropriate procedures for you to get one.**

WALDRON: **They have refused to tell me.**

* * * * * (Original transcript page 14.)

REFEREE BURSTEIN: I don't want to get into an argument over this. **If you want one, you have to follow the proper procedures. It is up to you to find out what the proper procedures are. No more argument.** ***

* * * * * (Original transcript page 20.)

WALDRON: Can I enter into evidence a statement by the County Retirement Association: **"At your request a copy of the procedures for disability retirement hearings is enclosed. I have searched, but we are unable to offer you any other advice."**

* * * * * (Original transcript page 21.)

REFEREE BURSTEIN: **We'll handle that later.** ***

#4 Referee Refuses to take Evidence of LACERA's Wrong-Doing

* * * * * (Original transcript page 24 .)

WALDRON: *** included the legal matters which appear in my letter to the referee, of which you have a copy, dated July 1st, I believe it is.

* * * * * (Original transcript page 24 .)

REFEREE BURSTEIN: What I would like to do, then, for the record, is I would like the record to reflect that there has been no communications between myself and either of the parties outside of the presence of either of the parties; Is that correct?

WALDRON: Absolutely.

REFEREE BURSTEIN: My intention is to continue this in light of the fact Dr. Shah was concerned with the comments and the statements that may have been made outside of her presence during the last proceeding. It is my intention to stay on the record at all times.

* * * * * (Original transcript page 50.)

REFEREE BURSTEIN: What is your purpose in introducing the July 1, '87 letter with the attachments.

WALDRON: They reviewed the points brought up by Mr. Black concerning the fact that the lupus was not part of the original claim.

REFEREE BURSTEIN: **Is that still relevant?**

C.C. PARRISH: The Board is now willing to proceed with regard to the issue of lupus.

REFEREE BURSTEIN: **That is no longer an issue. Let's not deal with issues that are no longer issues.**

* * * * * (Original transcript page 59.)

WALDRON: All right. **I would like to submit into evidence my attempts to get responses from the Board over a period of 20 years.**

REFEREE BURSTEIN: **How is that relevant to this case?**

C.C. PARRISH: **That is not relevant.**

* * * * * (Original transcript page 60.)

WALDRON: *** **There was not a lawyer anywhere that would appear before the Board. I then had correspondence with the Department of Labor in**

Washington to the California State Insurance Commission, the State Legislature, and various other parties who deplored the situation, whereby this Board is unregulated in any way,.....

REFEREE BURSTEIN: I am quite shocked at that statement, but we will leave that alone. *** **If there has been irregularities, you can raise those on appeal if you so choose. But I am not going to consider them in this case unless you can show that in some way they relate to your claim.**

* * * * * (Original transcript page 61.)

REFEREE BURSTEIN: I don't see how that goes to the issue of whether it is service-connected or whether you are incapacitated permanently. **That is going to bog down the record.**

WALDRON: **Fine. If you say so.**

* * * * * (Original transcript page 64.)

REFEREE BURSTEIN: Exhibit 29 -- **why are we putting in these record-keeping letters?**

WALDRON: Um, well --

REFEREE BURSTEIN: **This has nothing to do with your case.**

#5 County Counsel Does Not Enter Dr. Moss's Report into Evidence

* * * * * (Original transcript page 72.)

REFEREE BURSTEIN: **All right. Mr. Parrish, do you**

have any documents you wish to submit at the present time?

C.C. PARRISH: **Not at this time, no.**

#6 LACERA Takes Advantage of Applicants's Disabilities with Deliberate Delays and Refuses to let her make her Statement

* * * * * (Original transcript page 38.)

REFEREE BURSTEIN: Next one in order of the package you gave to me. Southern California Head and Neck Medical Group, dated June 12, 1986.

WALDRON: **Pharyngeal edema from stress and came on within hours of the last hearing. I nearly died from it.**

REFEREE BURSTEIN: I don't understand how it is relevant.

WALDRON: **It is from the lupus and stress. It was within hours of the last hearing.**

* * * * * (Original transcript page 62.)

C.C. PARRISH: *** I do have documentation with respect to the orthopedic and internal and psychiatric, as I understand it. So that I am certain it is still an issue because it has been covered in the application.

REFEREE BURSTEIN: Are you going to submit those medical records today?

C.C. PARRISH: No. I am not prepared to at this time.

* * * * * (Original transcript page 72.)

REFEREE BURSTEIN: **What we normally do at this point is we have opening statements, but in order to prevent duplication, I think if the parties don't object, we will dispense with the opening statements and that way, you can just swear in Dr. Shah, if that is agreeable with the parties.**

(sic: *gap in context in the original*)

WALDRON: **I have two very brief requests. First, I think you will be surprised how brief my testimony is** ***

REFEREE BURSTEIN: **My experience is such, despite your assertions of brevity, it never works that way.**

WALDRON: **I see.**

REFEREE BURSTEIN: **We'll have to wait till another date to see.**

* * * * * (Original transcript page 81.)

C.C. PARRISH: I have nothing further. **I will attempt to have a formal prehearing statement by next week.**

REFEREE BURSTEIN: Thank you. We will stand in recess until January 15 at 9:30. Is notice waived?

* * * * *

(Proceedings concluded at 12:10 P.M.)

DIANE LYNN WALDRON-SHAH

January 11th, 1988

Mr. Charles Spenser
Retirement Administrator
Los Angeles County Employees Retirement Association

Dear Mr. Spenser,

I am writing once again about my disability pension case which has been in process for twenty years and which was before your appeal referee Donald Black since 1984, then changed by you to a new referee, Mark Burstein, just before the final wrap-up hearing was scheduled to be held before Mr. Black, in January 1988. Now Mr. Burstein says everything must be started all over again from scratch, going back twenty years. I have been denied access to the regulations governing the Retirement Association, and it is unregulated by the California State Insurance Commission, or the Department of Labor, or any longer the County Treasurer, or by any other entity what so ever,, and its practices have become so egregious it is impossible to find an attorney who will handle a case before the Retirement Association.* * *

Is it legal or just for Mr. Black the referee at the previous hearings to state at the June 1986 hearing that he would hand down a ruling on the case in 90 days and then refuse to even respond for more than a year and then say that he would need another hearing, and not schedule that hearing until the *next* year?

Is it legal or just, shortly before that last brief hearing to wrap things up for a decision, for the Board to change referees, and then after more than three years under the

first referee, and for the new referee to say the case must be started all over again from the very beginning, going back twenty years, for him?

Is it legal or just for the new referee to say that all the voluminous materials entered into evidence under the previous referee are now out of evidence, and to say that the previous referee did not give him any materials pertaining to the case therefore I must recollect, reassemble, and reenter my materials into evidence?

Is it legal or just for the new referee Mr. Burstein to say, on the record, that he was not given any of the medical reports that I submitted to Mr. Black, but when it is pointed out in the transcript of the previous hearing that some of those medical reports were *individually* entered into the record as evidence and are thus indisputably property of the court, and not Mr. Black's to dispose of, for the new referee to then produce, from a chair seat beside him, the reports he denied he had, and for the County Counsel to also admit that he had most of those documents right with him and was totally familiar with their content?

Is it legal or just for the Board to deny me access to, and knowledge of where to obtain, the transcript of the previous hearing, which the Board's Counsel and Referee were using at this hearing?

Is it legal or just after the previous referee had instructed me in writing that all I now needed to complete my case was any current medical reports I wish to add into evidence and a statement under oath of the ways in which the Lupus disabled me from my County job, to have the new referee wait until I had arrived at the hearing

prepared to do only this, to say that he was starting again from scratch, rejecting all the points already accepted as established, such as the service connection of the disability, and taking out of evidence everything that had been previously entered, so that I must reassemble, reduplicate, and time-consumingly re-present into evidence, all that mass of materials again?

* * *

In conclusion-

Is it legal or just for this unregulated entity to have the power to simply 'delay until dead' for decades, and when that gets cumbersome to 'stress to death' legitimate applicants for a decision from the Board. Mr. Black said, out in the hall, to Deputy County Counsel Mr. Parrish when they were planning their strategy before the June 1986 hearing, "She's just going through the motions to get out to the courts." And the Board's strategy has been to delay handing down a decision indefinitely, to prevent the case getting out to the courts where it can receive a hearing on its merits, and where an attorney will be happy to represent me.

* * *

Yours sincerely,

D.L.Waldron

MARK BURSTEIN
ATTORNEY AT LAW

March 2, 1988

Wayne R. Parrish
Deputy County Counsel

In re: The Application of
Diane Waldron-Shah

In my February 9, 1988 letter to you and Dr. Waldron, I requested responses to issues that I raised and I gave deadlines for those responses. While I heard from Dr. Waldron, I have not received a response from you. Please respond to the matters which I raised in my February 9, 1988 letter by the close of business on March 10, 1988 or I will assume that you have decided not to respond and I will then proceed to the next step in the processing of this case.

Very truly yours, Mark Burstein, Referee

COUNTY OF LOS ANGELES
OFFICE OF THE COUNTY COUNSEL

March 8, 1988

Mark Burstein, Referee
Diane L. Waldron, M.D.

Re: DIANE L. WALDRON-SHAH
v. BOARD OF RETIREMENT

The Board of Retirement is willing to accept submission of the above entitled matter based upon the current state of the record.

Please advise due duties for written argument.

Very truly yours,DE WITT W. CLINTON, County Counsel
WAYNE PARISH, Principal Deputy County Counsel

MARK BURSTEIN

March 21, 1988

Dr. Diane L. Waldron, Wayne R. Parrish

In re: The Application of Diane Waldron-Shah

Pursuant to your responses to my February 9, 1988 letter, the record in the above-captioned case is closed. If either party intends to file a written brief in support of your position, it must be postmarked by Friday, April 15, 1988, and a copy must be simultaneously sent to the other party.

After reviewing the documents and the closing briefs, if any, I will issue my Findings of Fact, Conclusions of Law and Recommendation.

Very truly yours, Mark Burstein

DIANE LYNN WALDRON-SHAH

April 14th, 1988

Mark Burstein, Esq.

Thank you for your letter of March 21st, offering Mr. Parrish and myself the opportunity to file written briefs by April 15th, in support of our positions regarding my disability pension,. Even if I were a lawyer, or able to find one who would handle a case before the Retirement Board, a proper written brief would be impossible because the Retirement Board denies all access to their rules and regulations governing eligibility for pensions. One can hardly prepare a brief from the law when one is denied access to the stipulations of that law! Neither could I, or any lawyer, prepare a rebuttal against what ever case Mr. Parrish may have presented to you on behalf of the County because, while I have been required to send him a copy of what I have sent to you, he has not been under the same requirement to disclose to me the case that he has submitted to you, and I have no idea what-so-ever of the basis for his case for denial. * * * DL WALDRON

REFEREE BURSTEIN RULING AT HEARING JANUARY 7, 1988 *page 18 in original*

***what you submitted to anyone else prior to this hearing, this moment, prior to today, will not be considered.

page 18 in original

RECOMMENDATION: REFEREE BURSTEIN

(NOTE: There is uniquely no number on this one exhibit in the Recommendation)

Exhibits Offered By The Board 23/

March 26, 1974 report of Charles N. Moss, M.D.,P.HD., Medical Consultant to the Retirement Board

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23/ This document was submitted at the June 11, 1986 hearing.

page 41 in original

JOINT APPENDIX IN LIEU OF CLERK'S TRANSCRIPT, VOLUME 2, January 29, 1991

ADMINISTRATIVE RECORD

Exhibit No.	Document	Page #
2-A	Mar. 26,'74 report of Chas.N.Moss, MD	333-342

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DIANE LYNN WALDRON-SHAH

February 17th, 1990

Mark Ellis Singer

Dear Mr. Singer,

I am writing to remind you that my case will be going before the court in about a week from when you receive this and I hope you have read over the materials and done the research on that case on which you asked me to send you the reference once again in December, which I did. I again attach a copy of the news item since I know you do not like to look in the file for things.

I hope we did not lost our chance when the judge who knows the County situation went off that bench during the delays getting before him. A newer judge will not know about the corrupt and unethical practices of the County Retirement Board and you would not say yourself, nor let me say anything against the Board, etc., because you said it would only anger that judge, who presumably knew everything very well. Now it isn't in the record and that ;judge is gone while it took so long to get the case before him.

I am also worried about your not putting anything in your presentation that was also covered in my very detailed rebuttal to the referee's findings, because my rebuttal may not be admissible since I sent it after the fact to the County because they lied and said I was not allowed to be at the Board hearing or make any presentation.

I was under the impression that the whole point of this

procedure is to prove that the the other side made mistakes in law, misrepresented the facts, and acted with extreme bad faith, but you said bringing up such things would only anger the judge who didn't like confrontations in his court. Now, without him, we will probably have to go to appeal, where will our case be without any of that data on the record? The Appeal Court may not know about the County Retirement Board's notorious behavior, and more to the point, they are not allowed to base judgment upon something not in evidence, even if they did know it, such as that the County was not answering letters regarding appeals, was destroying records, was lying to pensioners about procedures and rules, was using 'referees' that were their creatures, was using every trick possible to delay until dead, etc., etc., etc. - and these facts are essential to my case.

Again, if there is not going to be a court recorder there anyway, we must arrange for one- and in that case not the one the County uses who delayed the transcript and left out critical statements. I wish they just taped these hearings. Is that possible?

Yours most sincerely,

Diane Lynn Waldron-Shah

LEMAIRE & FAUNCE
July 30, 1991

Re: DIANE WALDRON-SHAH - COURT OF APPEAL

Dear Dr. Waldron-Shah:

* * *

Our office received the faxes, however, I was on vacation and did not personally receive the faxes. My staff received the faxes, and responded to them as urgently as possible. The day I arrived in the office, the documents were sent to you.

* * *

MARK ELLIS SINGER

LEMAIRE & FAUNCE
September 19, 1991

Re: DIANE WALDRON-SHAH - COURT OF APPEAL

Dear Dr. Waldron-Shah

Enclosed please find, for your information, the REMITTITUR NOTICE from the Court of Appeal regarding your case.

If you have any questions, call me at extension 113 or you may call my assistant, Kathleen Palmore at extension 118.

Very truly yours, MARK ELLIS SINGER

COUNTY OF LOS ANGELES
RICHARD B. DIXON
CHIEF ADMINISTRATIVE OFFICER

September 3, 1991

Dear Dr. Waldron:

LOS ANGELES COUNTY RETIREMENT ASSOCIATION

Supervisor Edelman asked that I respond to the concerns you raised in your letter to him of August 5, 1991 regarding the County's procedures for reviewing the activities of the County Retirement Association and the Retirement Fund.

• • •

I recognize that your distress stems from personal dissatisfaction with the outcome of your case. I understand, however, that you had the fullest review by all appropriate bodies, including the Retirement Board and the Courts. I sincerely hope that you are able to put this matter behind you.

My very best wishes.
Chief Administrative Officer
c: Supervisor Edmund D. Edelman, LACERA

COPLEY NEWS SERVICE

COUNTY ABUSES MOUNT
By Howard S. Gantman
(November 4, 1991)
* * *
Speedy departure?

Some predict the allegations will speed the departure of embattled county Chief Administrative Officer Richard Dixon, one of the most-powerful non-elected public officials in California. Dixon already is under fire for approving millions of dollars in hidden management bonuses and spending lavishly to remodel executive offices all while the county slashed budgets for social services.

GRAFT

"We've exposed only the tip of the iceberg," said Rudy Rico, president of the Robin Hood Foundation, a reformist group of blue-collar county workers. "If the county cared to investigate the complaints, instead of retaliating, they could find millions misspent and ripped off."

Rees Lloyd, an attorney for county laborers, said: "Once the taxpayers of this county wake up to see how Dixon has been enriching himself and his cronies, he's history."
* * *

Dixon remains defiant, and insists he has strong backing among the supervisors. * * *

The results were rounds of budget cuts in health and welfare programs and hush-hush handouts of fat bonuses to managers who went along.

* * *

Dr. Waldron's County Board of Supervisors business cards

DIANE LYNN WALDRON-SHAH, Ph.D.
ASST. TO DIRECTOR, COMMUNITY IMPROVEMENT

BOARD OF SUPERVISORS
COUNTY OF LOS ANGELES

372 HALL OF ADMINISTRATION
LOS ANGELES 90012
625-3611. STA. 64132

Dr. Waldron's County Board of Supervisors note paper

FROM THE DESK OF

LYNN WALDRON-SHAH

BOARD OF SUPERVISORS
COUNTY OF LOS ANGELES

Dr. Waldron's County Board of Supervisors vehicle placard

THIS VEHICLE IS DESIGNATED FOR OFFICIAL COUNTY BUSINESS

LOS ANGLES COUNTY BOARD OF SUPERVISORS

Dr. D'L. Waldron-Shah

MERCEDES-BENZ **TBT 246**

Ernest E Debs
CHAIRMAN

Supreme Court, U.S.
FILED
JAN 15 1992
OFFICE OF THE CLERK

No. 91-1027

In The

Supreme Court of the United States

October Term, 1991

DIANE L. WALDRON-SHAH,
Petitioner,

v.

BOARD OF RETIREMENT OF THE LOS ANGELES COUNTY EMPLOYEES' RETIREMENT ASSOCIATION,
Respondent.

On Petition For A Writ Of Certiorari to
The Court of Appeal of the State of California

Brief In Opposition

DE WITT W. CLINTON
County Counsel

DANIEL E. McCOY, Principal
Deputy County Counsel and
Counsel of Record
648 Hall of Administration
500 West Temple Street
Los Angeles, California 90012
(213) 974-1937

Attorneys for Respondent

QUESTION PRESENTED

Does the United States Supreme Court have jurisdiction to issue a writ of certiorari to the state court where the federal questions asserted in the petition for writ of certiorari were not raised until after the state appellate court filed its decision and no state court considered the issues?

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JURISDICTION

The Supreme Court lacks jurisdiction to consider a petition for writ of certiorari to a state court where the federal issues were not raised until after the state court filed its decision. 28 USC, section 1257.

STATEMENT OF THE CASE

The respondent is the Board of Retirement (hereinafter "the Board") of the Los Angeles County Employees' Retirement Association. The Association is a legal entity created under the authority of California Government Code sections 31450, et seq., entitled "County Employees' Retirement Act of 1937." Its purpose is to provide a retirement benefit program for employees of counties within the State, such as the County of Los Angeles, upon adoption by the county's Board of Supervisors.

The petitioner (hereinafter "Waldron-Shah") was

employed by the County of Los Angeles for approximately two and a half years in the late 1960s and by virtue of her employment, she was a member of the Association.

Waldron-Shah's case is accurately set forth in the opinion of the state Court of Appeal contained in the petitioner's Appendix I, at pages 1-21. In substance, Waldron-Shah's medical problems rendered her incapacitated for her duties with the County. She claimed retirement benefits on the basis that her incapacity was due to job-related injuries and her claim was denied in an administrative proceeding. Using his independent judgment on the evidence, the trial court reviewing the administrative decision found that Waldron-Shah's incapacity was not job-related. On appeal the Court of Appeal of the State of California affirmed the trial court's decision.

The petitioner's Statement of the Case sets forth allegations of malfeasance by the Board and others and contentions that the process of administrative mandamus in the State of California violates rights protected by the Constitution of the United States. Those allegations and contentions were not presented to the state trial or appellate courts prior to the filing of the decision of the Court of Appeal of the State of California. Following the filing of the decision of the Court of Appeal, Waldron-Shah filed *pro se* a petition for rehearing before that court, claiming, among other things, that the Board had destroyed records, hid files of materials which had previously been entered into evidence, withheld from Waldron-Shah information about procedures available to her, lied to her concerning her rights, hired referees to serve the Board's interests to find against her, drove lawyers from practicing before it,

controlled the content of transcripts and coerced experts concerning their testimony.

She also alleged in her petition for rehearing before the state Court of Appeal that she had been denied her right to a jury trial and her right to equal protection of laws.

These claims made in the petition for rehearing were not made before the trial court or before the Court of Appeal.

The petition for rehearing was summarily denied. Waldron-Shah filed a petition for review before the Supreme Court of the State of California. The petitioner expanded on the issues she had raised for the first time in her petition for rehearing. She alleged in her petition for review that the Board had destroyed evidence, conspired with its referees to conceal and misrepresent the contents of many documents concerning her claim,

and perpetrated a fraud on the state courts. Further, the petitioner claimed that the Board "interfered with the integrity of the transcript" of the administrative hearing, and committed fraud in keeping evidence out of the record.

Waldron-Shah also alleged violations of her rights to due process, equal protection and a jury trial.

The Supreme Court of the State of California summarily denied the petition for review. (Appendix I, page 82)

The petitioner has filed a petition for writ of certiorari before this Honorable Court.

REASONS FOR DENYING THE PETITION

The Supreme Court of the United States has no jurisdiction to review the decision of the Court of

Appeal of the State of California where Waldron-Shah did not raise any federal issue until after the Court of Appeal had issued its decision.

LAW

The Court held in Cardinale v. State of Louisiana, 394 US 437, 438-439, 89 S.Ct. 1162 (1969),

> "The Court has consistently refused to decide federal constitutional issues raised here for the first time on review of state court decisions...
>
> "Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their

constitutionality."

Accord, Gates v. Illinois, 462 US 213, 221-224, 103 S.Ct. 2317, reh den 104 S.Ct. 33.

If the state court actually entertains the federal question and rules on it, the issue will be preserved even though the issue was raised for the first time by way of a petition for rehearing and even though, apart from the state court's actually considering it, the issue would not have been preserved. Cox Broadcasting Corp. v. Cohn, 420 US 469, 476, 95 S.Ct. 1029 (1975).

However, where no federal question was raised in the state court prior to a petition for rehearing and the petition for rehearing "was denied without more", the federal question cannot be properly presented to the Supreme Court of the United States. McGarrity v. Delaware River Bridge Commission, 292 US 19, 20, 54 S.Ct. 565 (1933). Timely assertion of the federal claim

must appear in the record. Ibid.

A state procedural rule which forbids the raising of federal questions at late stages in the case has been recognized as a valid exercise of state power. Williams v. Georgia, 349 US 375, 383, 75 S.Ct. 814 (1954).

In California, "[t]he rule is well settled that the theory upon which a case is tried must be adhered to on appeal. A party is not permitted to change his position and adopt a new and different theory on appeal. To permit him to do so would not only be unfair to the trial court, but manifestly unjust to the opposing litigant." Ernst v. Searle, 218 Cal. 233, 240-241, 22 P.2d 715 (1933)

In Sommer v. Martin, 55 Cal.App. 603, 610, 204 P. 33 (1921) the court stated,

> "The law casts upon the party the duty of looking after his legal rights and of calling the judge's

attention to any infringement of them. If any other rule were to obtain, the party would in most cases be careful to be silent as to his objections until it would be too late to obviate them, and the result would be that few judgments would stand the test of an appeal."

Issues raised for the first time in a petition for rehearing before the California Court of Appeal will not be considered. People Ex Rel. Department of Public Works v. Mascotti, 206 Cal.App.2d 772, 780, 23 Cal.Rptr. 846 (1962).

ARGUMENT

The statement of decision of the trial court shows that at issue presented to it was whether Waldron-Shah's disability "...has been shown to be service-connected according to applicable legal standards..." (Appendix I, page 22)

The opinion of the Court of Appeal of the State of California shows that Waldron-Shah's contentions on appeal were that "...she is disabled due to conditions other than Lupus, the trial court's finding is not supported by substantial evidence, and the weight of the evidence establishes her disability is service connected." (Appendix I, page 13)

No federal questions were raised.

Waldron-Shah alleges in her petition for writ of certiorari (pages 30-31), and refers to a letter to her attorney (Appendix II, pages 24-25) which indicates, that she urged her attorney to allege before the trial court the various Constitutional issues she now raises before this Court. The attorney did not do so.

Waldron-Shah thus admits that she was cognizant of the federal issues at the time the case was before the trial court and the issues were not raised. The issues

were waived and cannot properly be asserted for the first time after the state appellate court filed its decision.

The petitioner has not satisfied 28 USC section 1257's prerequisites to the United States Supreme Court's jurisdiction to grant a writ of certiorari to a state court. The state courts were not in a timely manner presented with, and did not consider or decide, any federal issue.

In addition, Waldron-Shah alleges that her constitutional right to a trial by jury has been violated. The right to a jury trial under the Seventh Amendment has not been made applicable to the states. Edwards v. Elliott, 88 US 532, (1874); Rankin v. Frebank Co., 47 Cal.App.3d 75, 91-92, 121 Cal.Rptr. 348 (1975). No substantial federal issue is presented on that point.

Finally, the petition for writ of certiorari is limited to the case as it appears in the record. Russell

v. Southard, et al., 12 Howard 139, 159, (1851); Johnson v. United States, 426 F.2d 651, 656, n. 8 (C.A.D.C., 1970); See Supreme Court Rules, Rule 12.5 and 14.1(h). The allegations Waldron-Shah makes in her petition for writ of certiorari, and on which she basis her claim that there are federal issues in this matter, were not made and were not established in the state courts.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted,

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